



THE COURT OF APPEAL

**Neutral Citation: [2024] IECA 310
Record No: 147/2023**

**Edwards J.
Burns J.
O'Moore J.**

BETWEEN/

NORA O'REILLY

APPELLANT

V

**THE PEOPLE (AT THE SUIT OF
THE DIRECTOR OF PUBLIC PROSECUTIONS)**

RESPONDENT

JUDGMENT of the Court delivered *ex tempore* by Mr. Justice Edwards on the 18th of November, 2024.

Introduction

1. On the 27th of April 2023, Ms. Nora O'Reilly (i.e., "the appellant") was convicted by a jury in the Circuit Criminal Court, Waterford of the sole count of burglary contrary to s. 12(1)(b) of the Criminal Justice (Theft and Fraud Offences) Act 2001. Having been duly convicted of the said offence, the Circuit Criminal Court passed sentence on the 4th of May 2023, ordering that the appellant serve a 4-and-a-half-year term of imprisonment.
2. Prior to the empanelment of a jury an application was made, on the 18th of April 2023, pursuant to the terms of s. 32 of the Courts and Court Officers Act 1995 to transfer the trial of the appellant from Waterford Circuit Criminal Court to the Dublin Circuit. That application was refused by the trial Judge.
3. The appellant by Notice of Appeal dated the 23rd of May 2023 has appealed to this Court against her conviction imposed in the Court below.

Factual Background

4. On the 1st of November 2021 the manager of two neighbouring restaurant premises, known as Burzza & Bodega, at John Street, Waterford entered an office located on the second floor of No 53 John Street, which was above one of the two restaurant premises in question and discovered that a sum of money in the approximate amount of €48,000 (being the takings from the two restaurants in question over a period prior to the 29th of October 2021) was missing from the said office.
5. At the trial of the matter, evidence was given by a Mr. Cormac Cronin, the restaurant proprietor, that he had prepared bundles of cash for lodgement to the bank and that these had been stored in a desk in his office at the second floor of 53 John Street, Waterford.

6. Gardaí were called and began an investigation in the course of which CCTV footage from the stairwell, the hallways and storage areas located between the two adjoining restaurants, and the upstairs area above the two restaurants, was obtained and viewed by investigating gardaí. A person (later identified as the appellant) was observed on the CCTV footage entering the stairwell between the two restaurants, making their way up the stairs and through the upstairs hallways, entering an upstairs office on the second floor and then leaving the premises.
7. The CCTV footage, which we are satisfied, having viewed it in court during the appeal hearing, was of moderate to good quality, showed the female intruder as wearing a woollen hat and a surgical type facemask. In some views the intruder has her facemask pulled up so as to obscure her nose and mouth, but at one point is to be seen with her mask down around her chin showing the majority of her face.
8. Mr. Cronin gave evidence that the cash found to be missing had previously been removed from red tubes which were stored in an underfloor safe to be sorted and counted into bundles of specific denominations and values for lodgement at the bank, and that after such sorting these bundles of cash had then been stored in the desk in his office at 53 John Street pending intended lodgement. Mr. Cronin stated that he had allowed the bundles of cash to accumulate for some time without making a lodgement and that he had last seen them six days earlier on the previous Tuesday (the cash having been discovered missing on the Monday following that, i.e., on the 1st of November 2021). He stated that when he went to look for the money on that date, he discovered it was gone. Mr. Cronin gave evidence that the total amount of money in the bundles, which was missing, was in the region of €48,000.
9. Garda Darragh McSweeney gave evidence that he was attached to Waterford Garda Station at the time in question and that at approximately 13:10 on the 1st of November 2021, he attended the relevant premises on foot of a report of money having been taken from the office of the restaurants in question.
10. Garda Sergeant John O'Sullivan also gave evidence that he attended at the premises in question for the purpose of obtaining CCTV footage evidence and that while at the premises he viewed the CCTV footage and that he identified the appellant as a suspect. Evidence was also given at trial by a Sergeant Steven Allen as to the identification of the appellant from viewing of the same CCTV footage having been requested to view that footage.
11. The appellant was arrested at her home at 13 Manor St. John, Lisduggan Co. Waterford on the 2nd of November 2021 and thereafter she was taken to and detained at Waterford Garda Station. The appellant was interviewed between 16:55 and 17:44 by Garda Darragh McSweeney, with Garda Stephen Allen also present. Nothing of evidential value emerged.
12. The appellant pleaded not guilty to the offence but was convicted by a jury following a trial on the 27th of April 2023.

Notice of Appeal

13. By a Notice of Appeal lodged the 23rd of May 2023, the appellant now appeals to this Court against her said conviction in the Circuit Criminal Court, Waterford. In support of this application the appellant has advanced four grounds which are as follows:

1. *"That the trial Judge erred in law and in fact in failing to transfer the trial from Waterford Circuit Criminal Court to Dublin Circuit Criminal Court.*
2. *That the trial Judge erred in law and in fact in failing to withdraw the case from the jury after the close of the prosecution case.*
3. *That the trial Judge erred in law and in fact in his charge to the jury.*
4. *Such further or other grounds as may arise from the transcript of the trial on receipt thereof."*

14. Only grounds 1 and 2 were ultimately proceeded with.

Application to Transfer the Trial to the Dublin Circuit

15. On the 18th of April 2023, the trial judge refused an application to transfer the trial of the appellant to the Dublin Circuit. The appellant's submission was that she could not get a fair trial due to her being "*known for all the wrong reasons*" in the county of Waterford. It was further submitted that the appellant was a member of an extended family who had some notoriety in the Waterford area and that the trial should have been transferred to the Dublin Circuit on the basis that it would be "*manifestly unjust*" to try the appellant in the county of Waterford.

16. The appellant submitted at the hearing before us that the application to transfer the trial ought to have been acceded to and that in the circumstances it was manifestly unjust not to have transferred the appellant's trial. The appellant refers to *Walsh on Criminal Procedure*, 2nd Edn.:

"The prohibition on appeal relates only to stand-alone appeals against a refusal to transfer. Where the accused is convicted, the prohibition does not prevent an appellant subsequently including an appeal against a refusal to transfer as part of his broader appeal against conviction".

17. The respondent submitted that the trial judge did not err when he refused the application to transfer the trial to the Dublin Circuit. It was submitted that transferring a trial due to being "*known for all the wrong reasons*" was neither a sound nor a sufficiently compelling reason to ground a transfer application. Moreover, the basis for the application had not been evidentially supported beyond the handing in of a list of the appellant's previous convictions. The respondent submitted that the trial judge acted correctly and appropriately when he exercised his discretion to refuse the application to transfer.

18. Given that the jury were expressly told that they should not serve if the appellant was known to them, the respondent submitted that any perceived risk of the appellant having

an unfair trial due to being known/having some notoriety in Waterford was thereby displaced.

Decision on Ground of Appeal No 1

19. We dismiss this ground of appeal *in limine*, in circumstances where the evidential foundations necessary to support an application for the transfer of the trial on the basis that the appellant could not get a fair trial in Waterford were simply not provided. The mere assertion that the appellant was concerned that she was “*known for all the wrong reasons*” in the locality, supported only by the handing in of a list of previous convictions cannot be regarded as having provided the necessary evidential foundation. We were told that some newspaper clippings were handed in but that they related to offences committed by the appellant in a different county and not the county of Waterford. The bar to be vaulted to justify the transfer of the trial is a high one. The onus of proof is on the appellant to show that they cannot get a fair trial in the place to which they have been returned for trial. This appellant did not discharge that burden or come remotely close to it.
20. Moreover, as counsel for the respondent has pointed out the jury were given an appropriate warning by the trial judge not to serve if they knew anybody involved in the case. This was a sufficient safeguard on the evidence that had been placed before the Court. We are completely satisfied that the trial judge’s decision not to transfer the trial is unassailable as having been a legitimate exercise of his discretion. Further, we do not think that he could legitimately have exercised his discretion any other way in light of the paucity of relevant evidence before him.

Failure to Withdraw the Case from the Jury at the Close of the Prosecution Case

Identification/Recognition Issue

21. The appellant submits that the central identification/recognition evidence was of such tenuous nature that in all of the circumstances the appellants’ case should have been withdrawn from the jury, particularly in circumstances where the evidence against the appellant consisted largely of purported recognition of the appellant from CCTV footage. The appellant refers this Court to the case of *The People (DPP) v. Brian McHugh* [2024] IECA 176 which has, since the appellant’s trial, clarified the parameters of permissible identification or recognition evidence based on CCTV recordings. It was observed in McHugh that evidence of recognition of a suspect from the viewing of CCTV footage by members of An Garda Síochána is in most cases admissible.
22. The appellant submits that in circumstances where the respondents’ case relied almost entirely on the identification/recognition evidence by two members of An Garda Síochána from CCTV footage and where the evidence of those gardaí did not disclose any specific means of identification of the appellant, other than the assertion of the gardaí that they immediately and conclusively knew from viewing the CCTV footage that the person shown on the footage was the appellant, that the CCTV evidence was so tenuous that the case should have been withdrawn from the jury.

23. In addition, the appellant submitted that in the instant case the face visible on CCTV was largely obscured by a medical mask, such that identification of the person shown was not possible due to the person's facial features being so extensively obscured by the said mask. Additionally, there was no feature such as a distinctive mark or a voice characteristic pointed to by gardaí as having assisted their identification of the appellant.
24. The appellant submitted that in those circumstances, the central evidence of purported recognition of the appellant by two members of An Garda Síochána was so tenuous and unreliable that it should have resulted in the withdrawal of the case from the jury on the basis that a jury could not safely convict based on it.
25. We were referred to the case of *DPP v. M* [2015] IECA 65, and it was submitted that given the state of the evidence at the conclusion of the prosecution case, in particular the existence of the surgical face mask being worn by the person on the CCTV footage, the purported recognition of the appellant from what it was contended was only moderate-quality CCTV footage with the face of the person covered to a significant extent, and failure of the gardaí to use facial mapping technology or some other objective means of identification in the course of the investigation, meant that there was a manifest risk of wrongful conviction of the appellant.
26. Counsel for the respondent in turn rejected any suggestion that the recognition evidence in the case was tenuous or of an unreliable nature as contended by the appellant and that the case should have been withdrawn from the jury.
27. We were referred on behalf of the respondent to the case of *People (DPP) v. Tynan* [2017] IECA 202. It was submitted that, as in *Tynan*, the jury in the instant case also had the benefit of valuable tools to assist them in their determination of the reliability of the Garda recognition evidence, such as the actual footage to review as appropriate and a photograph of the appellant, taken in detention, three days after the footage was recorded.
28. The respondent further submitted that the existence of evidence relating recognition to a specific feature or characteristic was not a pre-requisite to the admissibility of recognition evidence and in that regard counsel for the respondent placed reliance upon the case of *People (DPP) v. Thompson* [2024] IECA 22.
29. Counsel for the respondent contended that while the appellant argues that the footage was of a tenuous nature due to the fact that the appellant's face was largely obscured by a medical mask, both Sergeant O'Sullivan and Sergeant Allen had given evidence of making their respective identifications from parts of the footage where the appellant was not wearing a mask. Counsel submitted that the CCTV footage in this case was sufficiently clear, and was of sufficiently good quality, to allow the jury to conduct a fair and reliable assessment of it. Both identifying gardai had expressed a high level of certitude with respect to their recognition. Both had known the appellant for many years. Both stated that their recognition upon viewing the footage had been instantaneous. Accordingly, there was nothing tenuous or vague about the recognition evidence. Counsel for the

respondent submitted that the trial judge committed no error when he refused the application to withdraw the case from the jury.

30. It was submitted that the trial judge had "*very properly*" allowed this case to go to the jury, and there was absolutely no unfairness in circumstances where the trial judge gave "*very thorough and robust directions in relation to the frailties of identification and recognition evidence*".
31. In summary it was submitted on behalf of the respondent that given the nature of the evidence admitted during the trial, and in view of the directions given to the jury prior to their deliberations, there was no risk of a manifestly wrong or unsafe conviction being recorded by the jury in this instance.

Decision on Ground of Appeal No 2

32. We also have no hesitation in rejecting this ground of appeal. Indeed, having viewed the footage at issue, which we reiterate was in our view of moderate to good quality, and having considered the actual evidence given at trial, particularly the rapidity and certitude with which the gardai confidently asserted their recognition of the appellant, and the extent of their knowledge of the appellant, we regard this ground of appeal as having been almost unstateable. There was nothing vague, tenuous or uncertain about the evidence such as would have justified a trial judge in withdrawing the case from the jury, or in refusing to allow recognition evidence to go to the jury. The gardaí were not remotely hesitant about their identification. It was not true that the intruder's face was not visible. The CCTV clearly showed the intruder's face at a point where the surgical mask was down around that person's chin. Both gardaí had known the appellant for years. Their recognition of her upon seeing the segment of the recording where the mask was down was instantaneous. They expressed a very high level of certitude and were not shaken on this in cross examination. It was a matter for the jury of course as to whether they, having received this evidence, were happy to regard it as having being credible and reliable, but on no view of the Garda recognition evidence could it have been regarded as vague, tenuous or uncertain. There was absolutely no basis to withhold it from the jury. It was quintessentially a matter for the jury to consider. In our view the recognition evidence was properly allowed to go to the jury, and it may be inferred from the jury's verdict that they considered it to have been credible and reliable and were prepared to act upon it.
33. Ground of Appeal No. 2 is accordingly rejected.

Conclusion

34. In circumstances where we have not seen fit to uphold any of the appellant's grounds of appeal, the appeal against conviction is dismissed.