

No. 1

O. 58, r. 15



SUPREME COURT

Record No:

019/2019

Application for Leave to Appeal

Part I

The information contained in this part will be published. It is the applicant's responsibility to also provide electronically to the Office a redacted version of this part if it contains information the publication of which is prohibited by any enactment or rule of law or order of the Court

1. **Date of Filing:**

2. **Title of the Proceedings:** *[As in the Court of first instance]*

DIRECTOR OF PUBLIC PROSECUTIONS

-v-

WAYNE KINSELLA



3. **Name of Applicant:** WAYNE KINSELLA

What was the applicant's role in the original case: *[Plaintiff, Defendant, Applicant, respondent etc].* ACCUSED

4. Decision of Court of Appeal (where applicable):

Record No: 203/12

Date of Order: 23/10/18

Perfection Date: 31/01/2019

Date of Judgment: 23/10/18

Names of Judges:

Mr. Justice Birmingham, Mr. Justice Edwards & Mr. Justice McCarthy

5. Decision of the High Court:

Record No: 54/14

Date of Order: 21/5/12

Perfection Date: 21/5/12

Date of Judgment: 21/5/12

Names of Judge(s): Mr. Justice Sheehan

Where this application seeks leave to appeal directly from an Order of the High Court has an appeal also been filed in the Court of Appeal in respect of that Order?

Yes No

6. Extension of Time:

Yes No

If an application is being made to extend time for the bringing of this application, please set out concisely the grounds upon which it is contended time should be extended.

7. Matter of general public importance:

If it is contended that an appeal should be permitted on the basis of matter(s) of general public importance please set out precisely and concisely, in numbered paragraphs, the matter(s) alleged to be matter(s) of general public importance justifying appeal to the Supreme Court.

This section should contain no more than 500 words and the word count should appear at the end of the text.

1. This case gives rise to a question of exceptional and general importance as to the legal test on the question of what evidence might constitute corroboration in the context of serious criminal cases in which very substantial questions arise as to the credibility and reliability of prosecution witnesses.
2. The public interest in determining this issue is clear from the number and importance of cases, eg involving accomplices or complainants in sex cases, in which corroboration warnings arise.
3. The CA judgment demonstrates the lack of clarity in the law and the serious injustice and illogicality which can result: the Court acknowledged that the nature of the defence and the circumstances are relevant in assessing what might amount to corroboration (cf Kearns J in *P(DPP) v. Meehan* [2006] 3 IR 468) at p20 para 21“each case has to depend partly on established legal principles; partly on the manner in which the case is run; the nature of the facts in issue in respect of which corroboration is desirable or necessary and the nature of the defence. The Court of Criminal Appeal stated that it was of the view that a more flexible approach to the whole issue of corroboration beyond the narrow formulistic definition of *Baskerville* was entirely open on the decided cases in this jurisdiction and in the particular circumstances adverted to by Denham J. in *Gilligan*” [2006] 1 IR 107 [79]
4. However, the CA judgment appears to suggest that the test as to whether evidence may be corroborative is not whether it logically strengthens the prosecution case on a contested issue or renders the suspect witness’s evidence more reliable in a rational way, but whether the evidence is consistent with guilt: ie shows the accused was present when the crime was committed where innocent bystanders would not be expected.
5. The legal directions to juries regarding circumstantial evidence provide ample scope for the just assessment of such evidence consistent with guilt. However, where an accused has not merely declined to put in issue his presence at the crime scene – but has admitted it to gardaí while asserting his innocence, there is no reason in law, reason or justice – that evidence confirming that the accused was present, should be regarded as enhancing the reliability of suspect witnesses who are making distinct incriminating allegations.
6. It is acknowledged that certain *dicta* in various Superior court judgments in relation to corroboration appear to be ambiguous or inconsistent on those issues.
7. However the CA judgment is unsupported by authority and inconsistent with fundamental principle (presumption of innocence; burden of proof) in holding

that “the situation might have been different” if the Appellant advanced a specific account of his presence at the scene which showed that while his conduct was criminal, he was not guilty of the offence of murder. It is respectfully submitted that this demonstrates the defective reasoning in the CA judgment and the dangers that arise from its status as binding authority on trial courts.

Word count - 498

8. Interests of Justice:

If it is contended that an appeal should be permitted on the basis of the interests of justice, please set out precisely and concisely, in numbered paragraphs, the matters relied upon.

This section should contain no more than 300 words and the word count should appear at the end of the text.

1. The Appellant is serving a life sentence for murder and has always maintained his innocence and contends that he was wrongly convicted on the evidence of demonstrably unreliable witnesses. The legal issue raised in this application relates directly to the judge’s legal directions to the jury on the assessment of that evidence.
2. It is respectfully submitted that the requirements that justice be done and be seen to be done would be fulfilled by the Supreme Court granting the leave sought herein.
3. The inevitable implication of the CA judgment is that the Appellant’s comments to gardaí were capable of amounting to corroboration, so it is authority for the proposition that if an accused tells gardaí “I was at the scene of the crime but I did not participate in the crime” the jury may be directed that this may corroborate the claims of witnesses who are demonstrated self-interested liars alleging that the accused confessed to a murder.
4. The jury was told that the CCTV and the Appellant’s comments to gardaí could corroborate the accomplices.
5. No forensic evidence supported the claims made by the accomplices.

6. The Trial Judge refused to recharge the jury as to the defence contention that the accomplices had made false allegations against the Appellant to reduce the blame on Michael Kinsella.
7. It was contended that the accomplices were not reliable regarding incriminating allegations as to things said and done by the Appellant on his return to the apartment; that they had colluded to incriminate the Appellant, first to leave Michael Kinsella out completely, and subsequently to minimise his role. They claimed that the manner in which they made further statements in similar terms at similar times was mere coincidence. The Appellant contends that collusion is the true explanation.

Word count - 297

9. Exceptional Circumstances: Article 34.5.4:

Where it is sought to apply for leave to appeal direct from a decision of the High Court, please set out precisely and concisely, in numbered paragraphs, the exceptional circumstances upon which it is contended that such a course is necessary.

This section should contain no more than 300 words and the word count should appear at the end of the text.

Word count -

10. Grounds of Appeal

Please set out in the Appendix attached hereto the grounds of appeal that would be relied upon if leave to appeal were to be granted.

11. Priority Hearing: Yes No

If the applicant seeks a priority hearing please set out concisely the grounds upon which such priority is sought.

This section should contain no more than 100 words and the word count should appear at the end of the text.

Word count -

12. Reference to CJEU:

If it is contended that it is necessary to refer matters to the Court of Justice of the European Union please identify the matter and set out the question or questions which it is alleged it is necessary to refer.

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Part II