Neutral Citation Number: [2006] IEHC 244

THE HIGH COURT

[2004 No. 1181 J.R.]

BETWEEN

DAVID HALPENNY

APPLICANT

AND
THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

Judgment of Mr. Justice Diarmuid B O'Donovan delivered on the 11th day of July, 2006.

1. The applicant in this case seeks to prohibit a trial in which he is the defendant. In that regard, it is well established (C/F, in particular, an unreported judgment of the Supreme Court delivered on 21st November, 2005 in a case of D.C. v. The Director of Public Prosecutions) that he can only succeed in his application if he establishes that there are exceptional circumstances which justify the prohibition of his trial.

2. While, in a statement grounding his application for judicial review, the applicant purports to seek to prohibit a trial in respect of the six charges contained in a statement of charges dated 25th day of March, 2004 annexed to a book of evidence which was served on the applicant, it was indicated to the court at the hearing of this application that, in fact, the applicant only seeks to prohibit a trial on charge No. 1 in that statement of charges, namely; "that you the said accused on 27/04/2003 at Stephenstown, Knockbridge, Dundalk, Co. Louth in the court area and district aforesaid, did drive a vehicle registered No. 90 D 29089 in a manner (including speed) which, having regard to all the circumstances of the case (including the condition of the vehicle, the nature, condition and use of such place and the amount of traffic which then actually was or might reasonably be expected then to be therein) was dangerous to the public, thereby causing the death of another person namely Liam McCartney, contrary to s. 53(1) (as amended by s. 51 of the Road Traffic Act 1968) and (2)(a) (as amended by s. 49 (1)(f) of the Road Traffic Act 1994 and by s. 23 of the Road Traffic Act 2002) of the Road Traffic Act 1961." Accordingly, the application proceeded before me on that basis.

3. From the book of evidence, it would appear that the evidence upon which the prosecution rely in support of the said charge is as follows:-

> (a) That, on 27th day of April 2003 on the public road at Stephenstown Knockbridge in the County Louth, the applicant was driving a Mazda motor vehicle bearing registration number and letters 90 D 29089.
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> (b) While the applicant was driving the said motor vehicle around a bend on the said roadway, it went on to the incorrect side of the road way and there collided with an oncoming land rover motor vehicle owned and driven by one Brian O'Donoghue
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> (c) As a result of that collision, one Liam McCartney, a front seat passenger in the said Mazda motor vehicle, driven by the applicant, received injuries in consequence of which he died.
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> (d) Following the said collision, the said Brian O'Donoghue alleges that the applicant conceded to him "I took that corner a bit fast didn't I?" and, in a statement dated 28th day of April, 2003 witnessed by Sergeant Aidan Costello and Garda Dominic Walsh of the Garda Síochána, the applicant (*inter alia*) maintained that, as he approached the bend at which the collision occurred, the said Liam McCartney deceased "reached over in what I thought was an attempt to grab the wheel. I tried to push him away with my left arm and the next thing I knew there was a bang".
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> (e) In his statement aforesaid of the 28th April, 2003, the applicant conceded that, prior to driving the said Mazda motor vehicle on the said occasion, he had had a number of alcoholic drinks and, having examined the applicant following the said collision Dr. Harpal Sing Guijral of the Lourdes Hospital, Drogheda, expressed the opinion that he was extremely intoxicated from both alcohol and opiates with resultant cumulative intoxication.
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> (f) Having examined both the said land rover motor vehicle driven by the said Brian O'Donoghue and the said Mazda motor vehicle driven by the applicant, Garda E.J. Hynes, a Public Service Inspector with the Garda Division of the counties Louth and Meath, was of the opinion that neither motor vehicle manifested any mechanical defect which could have contributed to the collision aforesaid.

4. The grounds upon which the applicant seeks to prohibit a trial on the said charge are:

> (a) Notwithstanding that the applicant's representatives requested the preservation of any physical evidence for the purpose of examination by the defence and, in particular, sought confirmation as to where the vehicles involved in the said collision might be inspected on behalf of the defence, the Garda Síochána failed to preserve the said vehicles thereby depriving the applicant of the opportunity of having the same examined on his behalf by an appropriately qualified expert.
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> (b) The Garda Síochána failed to give notice to the applicant of their intention to dispose of the said motor vehicles.
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> (c) The Garda Síochána failed to carry out an adequate examination of the said motor vehicles
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> (d) A passenger in the said Mazda motor vehicle driven by the applicant, Mr. Paul McGauley, who was a potential witness for the defence, has died in an unrelated incident and, on that account, in the light of delay on the part of the Director of Public Prosecution in furnishing adequate disclosure material, the applicant is prejudiced in his defence
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> (e) The failure of the Garda Síochána to preserve the said motor vehicles for examination on behalf of the applicant has deprived him of the reasonable possibility of rebutting the evidence preferred against him.

5. While conceding that, despite a request in that behalf from the applicant's solicitors, the Garda Síochána did fail to preserve the said motor vehicles for examination on behalf of the applicant and failed to give notice to the applicant of their intention to dispose thereof, the respondent, nevertheless, opposed the application for the relief sought herein and did so, essentially, on three grounds namely;

> (a) That, notwithstanding the provisions of Order 84 Rule 21 of the Rules of the Superior Courts, the applicant failed to

apply for the relief sought herein within a period of three months from the date when the grounds for the said application first arose,

(b) That the applicant was guilty of delay in seeking inspection facilities for the said motor vehicles and, therefore, is precluded from relying on the failure of the Garda Síochána to preserve them, and

(c) That an independent engineering inspection of the vehicles in question would not have assisted the applicant to demonstrate his innocence of the charge which has been preferred against him nor would it damage the case for the prosecution.

6. Accordingly, the respondent submitted that the fact that the applicant did not have the opportunity to have the said motor vehicles inspected on his behalf does not deprive him of the reasonable possibility of obtaining evidence which might assist his defence or weaken the case for the prosecution and, therefore, does not inhibit his prospects for obtaining a fair trial.

7. Insofar as it is suggested on behalf of the respondent that the applicant is precluded from obtaining the relief sought herein because of his failure to comply with the provisions of Order 84 Rule 21(1) of the Rules of the Superior Courts, it is clear that the relief sought by the applicant arises from the fact that the two motor vehicles involved in the collision aforesaid were not made available for inspection on his behalf by a suitably qualified expert. In that regard, however, notwithstanding that the available evidence establishes that the applicant became aware of the fact that the said motor vehicles were no longer available for inspection on 30th August, 2004, he did not apply for leave to seek judicial review until 20th day of December, 2004 which was some three weeks outside a period of three months from the date when the grounds for the said application first arose; being the period limited by Order 84 Rule 21(1) of the Rules of the Superior Courts for bringing an application for leave to apply for judicial review. In that regard, the applicant purports to justify his delay in bringing an application for leave to apply for judicial review on the grounds that, on the 18th day of August, 2004, before he had learnt that the said motor vehicles were no longer available for inspection, his solicitor, Mr. Michael Hennessy, had written to Dr. Mark F. Jordan, a Consultant Forensic Engineer, requesting that Dr. Jordan examine the said vehicles with a view to submitting an appropriate report thereon. However, when it became clear that the said motor vehicles were no longer available for inspection by Dr. Jordan, Dr. Jordan requested that photographs of the said motor vehicles and photographs of the scene at which the collision aforesaid had occurred, which, apparently, were then in the possession of the Garda Síochána, be made available to him. However, although a number of requests in that behalf were made by the applicant's solicitor to Gerald Daly Esq., State Solicitor for the County Louth, and Mr. Daly assured the applicant's solicitor that such photographs would be made available; in the light of which assurance, the applicant's solicitor deferred making an application on behalf of the applicant for leave to apply for judicial review until those photographs were to hand, the fact of the matter, however, is that those photographs were not made available and, while he was awaiting their receipt, the applicant's solicitor overlooked the fact that the time limited by the rules of the Superior Courts for making an application for leave to apply for judicial review on behalf of the applicant was running out, and indeed, overlooked that time limit until reminded thereof by junior counsel for the applicant. The fact of the matter is that the application for leave to apply for judicial review was made to the court ever before those photographs were forwarded to Dr. Jordan. It was in those circumstances that there was a failure to comply with the provisions of Order 84 Rule 21(1) of the Rules of the Superior Courts with regard to the making of the said application for leave to apply for judicial review. In my view, it is very understandable that the applicant's solicitor would have deferred making an application on behalf of the applicant for leave to apply for judicial review until those photographs had been made available to Dr. Jordan and it is equally understandable that the time limit within which that application should be made might be overlooked while awaiting receipt of those photographs. In those circumstances, allowing that the applicant was only three weeks out of time for making his application for leave to apply for judicial review, it is my judgment that that is a good reason for extending the period within which that application ought to have been made and I so order.

8. Insofar as it is alleged on behalf of the respondent that the applicant is precluded from the relief sought herein on the grounds that, although it was conceded on his behalf that he first consulted a solicitor with regard to the events which occurred on 22nd April, 2003, i.e. the date of the collision aforesaid, on 21st May, 2003, it was not until the 26th April, 2004, that a request was made on his behalf to have the motor vehicles involved in the said collision available for inspection and it was not until 18th August, 2004 that an effort was first made to retain the services of an engineer on his behalf; the implications being that the applicant did not consider that the condition of the said motor vehicles in anyway contributed to the collision aforesaid and, that therefore, an inspection thereof would assist him in defending the charge preferred against him. In my view, while that is an argument that could be advanced when challenging the credibility of the applicant with regard to any suggestion that he might now make that the condition of one or other of the said motor vehicles contributed to the said collision, in the circumstance that the trial of the charges against the applicant in the Circuit Court were not going to be heard before the month of October 2004, the fact that the applicant may have been guilty of some delay in requesting that the said motor vehicles be available for inspection or in retaining the services of an engineer do not, in themselves, in my view preclude him from obtaining the relief sought herein.

9. The contention of the applicant that, arising from the failure of the Garda Síochána to preserve the said motor vehicles for inspection by a suitably qualified expert on his behalf has inhibited his capacity to defend himself in relation to the charge which has been preferred against him, or to weaken the case for the prosecution, is based on the contents of a report dated 16th December, 2004, submitted by the aforesaid Dr. M.F. Jordan. In that report, Dr. Jordan asserts (inter alia) that, had he had the opportunity to examine the said vehicles, he could reasonably have been expected to ascertain;

(a) The extent of the damage directly by physical measurement and thereby an estimate of the collision speed.

(b) The extent of the damage attributable to the fatal collision given that some damage must be attributable to rescue personnel and vehicle recovery personnel and that there may have been some pre-existing damage having regard to the fact that, prior to the fatal collision, the Mazda motor vehicle driven by the applicant had been in collision with a ditch.

(c) The seat belt service at the time of collision.

(d) Specific defects which may have contributed to the collision.

(e) Evidence of interference with the drivers control of the car.

(f) Evidence in relation to tyre pressures, condition of steering linkages and vehicle modifications which may have contributed to the accident, and

(g) The nature of the damage to the tyres in the skidding phase; which tyres deposited the marks, what the orientation of the car was at the time of the deposition of the rubber and so on.

10. However, in that report, Dr. Jordan conceded that the original photographs which he believed were in the possession of the Garda Síochána would clarify certain aspects of the interior and the exterior of the car which the applicant was driving and would help assess collision speed and vehicle orientation at the time of the collision although he noted that photographs are a poor substitute for direct inspection. He also conceded that photographs of the scene and, in particular, photographs of skid marks on the road may provide further clarification as to what occurred. However, it is, I think, of some significance that, in that report, Dr. Jordan does not suggest that an examination of the said motor vehicles might contradict any of the available evidence with regard to the circumstances of the said collision which presumably was available to Dr. Jordan when he was asked to examine the motor vehicles.

11. There is no doubt in my mind but that the failure of the Garda Síochána to ensure that the said motor vehicles were preserved for examination on behalf of the applicant; particularly, as they had been specifically been asked by the applicant's solicitor to preserve all physical evidence associated with the collision aforesaid and to indicate where the said vehicles might be inspected on behalf of the defence,`was a very grave omission on their part and I would urge the Garda authorities to enquire into the circumstances of that omission with a view to ensuring that a similar situation does not arise in other cases. Moreover, I think that the omission to preserve those motor vehicles for inspection on behalf of the defence was compounded by the failure of the Garda Síochána to notify the applicant's solicitors of the possibility that the said motor vehicles might be destroyed. However, while I consider that the Garda Síochána were very negligent in that behalf, it does not, in my view, necessarily follow that, because the applicant has not had the opportunity and never will have the opportunity of having the said motor vehicles examined on his behalf by an appropriately qualified expert, he is ipso facto entitled to an order prohibiting his trial on the charges which have been preferred against him. In that regard, the implications of "lost evidence" in the context of the prosecution of criminal trials has been considered by the courts over the years and it is well settled that an accused person must be afforded every reasonable opportunity to inspect all material evidence which is under the control and power of the prosecuting authorities in order, adequately, to prepare his defence C/F *Robert Murphy v. The Director of Public Prosecutions* [1989] I.L.R.M. at pg.71) being a case in which the learned trial judge; Lynch J., also held that members of the Garda Síochána ought not to have parted with possession of a car which was involved in the incident which gave rise to the proceedings without examining it forensically or, alternatively, notifying the accused's legal representatives of their intention to dispose of it. The judgment of the court in *Murphy's* case was approved by the Supreme Court in a case of *Daniel Braddish v. The Director of Public Prosecutions and His Honour Judge Haugh* [2001] 3 I.R. at pg. 127 which, in turn, was approved of in judgments of the Supreme Court delivered in the cases of *Robert Dunne v. The Director of Public Prosecutions* [2002] 1 I.R. at pg.305 and *James Bowes v. The Director of Public Prosecutions* and *Deirdre McGrath v. The Director of Public Prosecutions* [2003] 2 I.R. at pg.25. The reasoning behind those decisions was that an accused person must not be deprived of the reasonable possibility of rebutting evidence proffered against him which might be available on an examination of material evidence notwithstanding, as Lynch J. held in the course of his judgment in the said case of *Murphy v. The Director of Public Prosecution*, that "It may well be that nothing would have been discovered by the requested forensic inspection but the applicant has been deprived of the reasonable possibility of rebutting the evidence proffered against him". However, as I interpret these authorities, it is not necessary to establish that the "lost evidence", had it been available for inspection, could have exculpated the accused; all that it is necessary for him to satisfy the court is that there is a reasonable possibility that such an examination would have assisted his defence, or weaken the prosecution, so that there is a serious risk that, in the absence of such an examination, he will not obtain a fair trial. As Finlay C.J. stated in the course of a judgment of the Supreme Court delivered in a case of *Z. v. The Director of Public Prosecutions* [1994] 2 I.R. at pg.506, "The onus of proof which is on an accused person who seeks an order prohibiting his trial on the ground that circumstances have occurred which would render it unfair is that he should establish that there is a real risk that by reason of those circumstances… he could not obtain a fair trial". In that regard, Hardiman J. in the course of an unreported judgement of the Supreme Court delivered on the 7th day of March, 2006, in a case of *Brendan McFarlane v. The Director of Public Prosecutions* and the Members of the Special Criminal Court stated "In order to demonstrate that risk there is obviously a need for an applicant to engage in a specific way with the evidence actually available so as to make that risk apparent". In the course of that judgment, Hardiman J. went on to say that that onus of proof was not a burdensome one; that it did not involve establishing the certainty, or even the probability, of an unfair trial but merely that there was a real risk that the applicant would not obtain a fair trial. On the other hand, he also stated that "A remote, fanciful or purely theoretical form of prejudice is plainly not sufficient to entitle him to relief. An applicant in this position must address if it is possible the actual specific facts of his case".

12. Applying the above principles to the facts of this case, I am not persuaded that the applicant's capacity to defend himself with regard to the charge which has been preferred against him or, indeed, weaken the case for the prosecution has been impaired by the fact that he was deprived of the opportunity to have the motor vehicles in question inspected on his behalf by a suitably qualified expert. In other words, I do not think that the fact that he was deprived of the opportunity of having those motor vehicles inspected gives rise to a real risk that he cannot obtain a fair trial. In the light of Dr. Jordan's report, I accept that, had he had the opportunity of examining those vehicles, it is very possible that he would have learnt a lot more about the incident which gave rise to these proceedings. Following such an examination, he might well have been able to determine the speed at which the two vehicles were travelling at the point of collision or the angle of impact between them and, indeed, he might well have been able to point to some defect in either motor vehicle which *might* have contributed to an accident. In fact, it is likely that, following such an examination, Dr. Jordan would have been able to point to a variety of matters with regard to the two motor vehicles which are not presently known. However, in the light of what is currently known about the circumstances of the incident which gave rise to this claim, can it be said that anything that Dr. Jordan might have discovered on an examination of the two motor vehicles in question would give rise to a real risk that the applicant would not obtain a fair trial. As Mr. Justice Hardiman said in the course of his judgment in the case of *McFarlane v. The Director of Public Prosecutions*, herein before referred to, in order to demonstrate that there is a real risk that he cannot obtain a fair trial, it is necessary for an applicant for an order of prohibition to engage in a specific way with the evidence which is actually available against him. In this case, the available evidence establishes that, while the applicant was driving a car around a bend on a public road, it crossed to its incorrect side and there collided with an oncoming vehicle as a result of which a passenger in the car driven by the applicant was killed. In my view, those facts, alone, establish a *prima facia* case of dangerous driving causing death on the part of the applicant. In addition, however, there is evidence that, following the accident, the applicant purported to explain why it occurred by conceding that he had taken the bend too fast and that his passenger had attempted to grab the steering wheel. He did not suggest that the motor vehicle which he was driving had crossed to the incorrect side because of a sudden mechanical failure or, indeed, because of any mechanical defect and, in that regard, the public service vehicle inspector, who had the opportunity of examining both of the vehicles involved in the said collision expressed the view that neither motor vehicle manifested any mechanical defect which could have contributed to the collision. In this regard, also, it seems to me that the lack of urgency on the part of the applicant to have the motor vehicles examined by Dr. Jordan is a clear indication that he, himself, did not consider that there was anything wrong with them which contributed to the collision. In addition, of course, there was evidence that, at the material time, the applicant was extremely intoxicated. In my view, even though there is a possibility that Dr. Jordan might have found a defect in either motor vehicle which might have contributed to the collision, it is abundantly clear from the available evidence that it is extremely unlikely that such a defect was the cause of the collision. Accordingly, it seems to me that the suggestion that, had Dr. Jordan had the opportunity of examining the motor vehicles in question there is a reasonable possibility that the result of that examination would have assisted the applicant in defending the charge which has been preferred against him, or weaken the case for the prosecution, is, to use the words of Hardiman J. in the case of *McFarlane v. The D.P.P.*, herein before referred to, "remote, fanciful or purely theoretical". Accordingly, I do not consider that the fact that this applicant did not have the

opportunity of having the motor vehicles in question examined on his behalf by a suitably qualified expert involves the exceptional circumstances which would justify the prohibition of his trial.

13. For the sake of completeness, I should say that I do not consider that the fact that one of the passengers in the car driven by the applicant; Paul McGauley, who would have been a potential witness for the applicant is now deceased as a result of an unrelated incident is a reason which entitles the applicant to prohibition of his trial. In that regard, no one can be blamed for Mr. McGauley's death and I am not persuaded that there was any delay on the part of the prosecution in progressing the charges against the applicant. In any event, it is clear from the statement of the investigating guard, Garda Dominic Walsh, who interviewed Mr. McGauley following the accident, that he had no relevant evidence to offer with regard to its circumstances.

14. Finally, in fairness to counsel for the applicant, I should not ignore the fact that he strongly urged upon me that the decision of the Supreme Court in the case of *McGrath v. The Director of Public Prosecutions*, herein before referred to, was persuasive authority for the proposition that this applicant was entitled to an order of prohibition. In that case, the court granted prohibition on the grounds, coincidentally, that Dr. Mark Jordan had not had the opportunity of examining a motor cycle which had been involved in the incident which gave rise to the claim and that, therefore, there was a risk that the applicant would not get a fair trial. In my view, however, the facts of that case are readily distinguishable from those in this case, in that, in that case, there was every possibility that an examination by Dr. Jordan of the motor cycle in question could have pointed to a cause for the incident which gave rise to the claim which would have exonerated the applicant of any blameworthiness. In my view, that was not the situation in this case.

15. In the light of the foregoing, I must dismiss the applicant's claim for judicial review.