Neutral Citation Number: [2009] IEHC 27

THE HIGH COURT

JUDICIAL REVIEW

2008 371 JR

BETWEEN

JASON ENGLISH

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of O'Neill J. delivered on the 23rd day of January, 2009

In this case, the applicant was given leave by this court (McGovern J.) on 21st April, 2008, to seek by way of judicial review an injunction restraining the respondent from continuing a prosecution by the respondent against the applicant in respect of two charges of criminal damage contrary to s. 2 of the Criminal Damage Act 1991. These two charges, which were arson charges, were in respect of two incidents that occurred in the early hours of the morning of 14th August, 2003.

In the first of these incidents, it is alleged that the applicant set fire to a shutter attached to Ryan's Bar (Noddy's Bar) at Ballybeg, Waterford. In the second incident which occurred later on the same night, it is alleged that the applicant set fire to a dwelling at 170, Clonard Park, Waterford .

Both fires were quickly discovered and extinguished so that the damage caused was relatively minor. The gardaí were on the scene quickly. It transpired that a CCTV camera covered the scene of the fire. The videotape was recovered and viewed promptly by Garda Eugene O'Neill, by the owner of the bar, Eugene Ryan, and by a tenant who lived over the bar, Matthew Kenny Junior. Matthew Kenny positively identified the applicant as the person setting fire to the shutter. Garda O'Neill, in an affidavit in these proceedings, averred that it was impossible to identify anyone in the videotape. Mr. Ryan, in his statement in the book of evidence, said:

> *"We viewed the security tape and saw a male wearing a light grey top, dark jeans, a white baseball cap, pouring fluid on the shutter and setting it alight."*

On foot of the identification of the applicant made by Mr. Kenny, the applicant was arrested on 20th November, 2003, and taken to Waterford Garda Station. The custody record which is exhibited in these proceedings reveals that the applicant was taken to an interview room at 8.00pm. The applicant was interviewed by Sergeant John McDonald and Garda Conor McCarthy. The interview was videotaped. During the interview which appears to have been over by 8.15pm, the applicant denied any involvement in the crimes alleged. That changed quickly, however, and after a caution, the applicant made a statement fully confessing his guilt in respect of these two crimes.

The applicant was returned to the public office at 8.30pm, was photographed at 8.32pm and released from custody at 8.35pm.

On 25th February, 2004, a complaint was made to the District Court and summonses issued in respect of both alleged offences. These summons had to be reissued on 26th July, 2005, 23rd January, 2006, 12th June, 2006, and 23rd October, 2006. The summonses were eventually served, apparently on the applicant's sister, at the end of January 2007 and were returnable to the District Court for 15th February, 2007.

On 1st March, 2007, the applicant was returned for trial to Waterford Circuit Court. On 5th March, 2007, the applicant served a notice of alibi in respect of one CoCo Mitchell. The applicant's case was in the Circuit Court on 15th May, 2007, 16th October, 2007, 15th January, 2008 and 22nd January, 2008.

On 22nd January, 2008, it was disclosed by the prosecution that the videotape allegedly showing the applicant setting the fire at Noddy's Bar was missing and could not be located.

Following upon that revelation the applicant commenced these proceedings.

In these proceedings, the applicant seeks the relief sought on the ground that he claims he now cannot get a fair trial because his defence is prejudiced by the loss of the videotape and by the delay of three years, between February 2004 and February 2007, during which time he claims there was a culpable failure on the part of the respondent to effect service of the summonses on the applicant who was during all of that time residing at his normal place of residence.

In an affidavit sworn by the applicant's solicitor and filed the day before the hearing of this matter, it was intimated that the applicant would challenge the admissibility of his statement at his trial.

For the applicant, it was submitted by Mr. Maher S.C. that without the videotape the applicant could not now meaningfully challenge the basis of his arrest which had been based solely on the identification of the applicant in the videotape by Mr. Kenny. Without the videotape, it was submitted it would be impossible, or at the very least very

difficult, to satisfy a trial judge and that it was impossible to identify the applicant in the videotape, and hence that there was not a *"reasonable cause"* for his arrest. Consequently, his challenge to the admissibility of his statement would be grossly prejudiced by the loss of the videotape.

Furthermore, it was submitted that if the matter went to the jury, the applicant's defence would be prejudiced if the jury could not see the videotape themselves. Without that, the jury could be swayed by the evidence of Mr. Kenny, notwithstanding the fact that Garda O'Neill's evidence apparently would be to the effect that it was impossible to identify anyone in the videotape.

Mr. Maher relied heavily on the judgment of the Supreme Court in *Braddish v. DPP* [2001] 3 I.R. 127, submitting that this case is on all fours with the *Braddish* case.

Insofar as delay was concerned, he submitted that the delay was unexplained, in effect. The only explanation for it was hearsay evidence to the effect that the applicant may have been evading service of the summons. He submitted that this evidence should be ignored by the court. Mr. Maher submitted that there were two prejudices flowing from the delay, namely, the loss of the videotape and, secondly, the ill-health of CoCo Mitchell, the applicant's alibi witness, as a consequence of which, he submitted, that she could not now be relied upon by the applicant as a witness.

For the respondent, it was submitted by Ms. Phelan B.L., that the applicant had made a full statement of confession and that the court should give great weight to that. In particular, the court should have regard to the fact that the interview in which the statement was made was videotaped and that tape is available. Further, she submitted that the court should also have regard to the very short period of time i.e. from 8.00pm to 8.30pm during which the interview took place and the statement was made. She relied upon the cases of *Scully v. DPP* [2005] 1 I.R. 242 at p.254-256, and *McFarlane v. DPP* [2008] IESC 7, in that regard.

Ms. Phelan also stressed that having regard to the eleventh hour intimation of a challenge to the admissibility of the statement in the bald form in which that intimation came, the court should have scant regard to the merits of any such purported challenge and she submitted that it should be left to the trial judge to adjudicate on that challenge if it ever materialises.

Ms. Phelan further submitted that the request for the videotape was extremely tardy, coming three and a half years after the applicant knew he would be prosecuted and that the videotape would be an important aspect of the case against him.

She submitted that there was no evidence to support the contention that the delay had any bearing on Ms. Mitchell's capacity or availability to be an alibi witness for the applicant.

Decision
I am quite satisfied that the videotape was an important piece of evidence which should have been preserved by the gardaí. The loss of that tape was the result of a breach by the respondent of the duty to preserve the videotape. The loss occurred in circumstances that are now all too familiar.

Garda O'Neill had custody of the videotape and for safekeeping placed it in his own personal locker. In due course, it got mixed with the variety of things one would expect to find in such a place, including, perhaps, other tapes and was thus lost beyond retrieval.

Sitting as the judge dealing with judicial review cases, I have encountered this precise set of circumstances leading to the loss of important evidence, in several cases. On several occasions in these cases, I have drawn attention to the inadequacy of arrangements in garda stations for the secure storage of evidence of this kind.

Once again, I repeat that it is incomprehensible that every garda station does not have a facility for the secure storage of this kind of evidence. It is wholly unacceptable that evidence of this kind invariably ends up in the personal locker of investigating gardaí. I appreciate that gardaí do the best they can to safeguard evidence in this way, where there is no dedicated secure storage facility for that purpose.

What is required is neither elaborate or expensive. A locked cupboard or filing cabinet would suffice into which the evidence, properly labelled, namely, with the name of the accused, the investigating garda and the numbers of the charge sheets or summonses attached.

As a consequence of the absence of such a simple and basic facility, dozens of criminal trials have been delayed for lengthy periods and a great deal of money has had to be needlessly expended on judicial review proceedings. In addition, a small number of trials have been prohibited with the consequent defeat of the right of the public to have these matters prosecuted to a lawful conclusion.

It is my sincere hope that after almost a decade of these cases, that the root cause of the loss of these items of evidence, as discussed above, will finally be addressed.

The next issue which arises is whether, notwithstanding the loss of this videotape, the applicant can get a fair trial.

There is no doubt that the evidence in this videotape would be of direct relevance to two aspects of the defence; firstly, a challenge to the lawfulness of the arrest of the applicant leading to the exclusion of the statement, and secondly, to the merits of his defence before the jury if the case proceeded that far.

On the other hand, the applicant has made a statement which amounts to a full confession in respect of both alleged crimes. Although the applicant's intimation of an intention to challenge the admissibility of the statement he made, came at a very late stage and in very bald terms, it is, nonetheless, clear that a ground of such a challenge would be the lawfulness of his arrest based upon the purported identification of him by Mr. Kenny from the videotape. Whether other grounds emerge as the basis of a challenge to the admissibility of the statement is unclear and could only be a matter of speculation. Having regard to the circumstances surrounding his detention, interview and the making of the statement and the length of the time involved, including the fact that it is videotaped and that tape is available and bearing in mind the lateness of the averment to the effect that there would be a challenge to admissibility, the likelihood of a challenge

to admissibility on any grounds other than the lawfulness of the arrest would be a factor to which I would be inclined to attach little weight.

It would, in my opinion, appear likely that the primary issue at the trial from the point of view of the defence will be the challenge to the admissibility of the statement on the ground that there was not *"reasonable cause"* for the arrest. This case is somewhat unusual in that the videotape was viewed by two persons as well as the investigating garda, Garda O'Neill. Garda O'Neill says in his affidavit in these proceedings that it was impossible to identify anyone in the videotape. Mr. Ryan, the owner of the bar, does not identify the applicant but describes the person seen in the videotape by reference to his clothing. Mr. Kenny identifies the applicant and refers to the clothing he was wearing *i.e.* his light grey top and dark jeans which he says he was *"still wearing".* Mr. Kenny had, earlier that evening, according to his statement, seen the applicant and his younger brother who appeared to have been known to him, involved in an incident outside the window of his flat. He says in his statement that he opened the window and shouted out at them.

Having regard to the availability of the evidence of these three persons as to the content of the videotape, in my opinion, the applicant will be able to mount his aforesaid challenge to the admissibility of the statement without material prejudice to him. In this respect, in my view, the circumstances revealed in this case are different to those envisaged or described in the *Braddish* case. It is to be borne in mind also, that on such an application in the criminal trial, the burden of proof will be upon the prosecution, not the applicant, and the trial judge will have to be satisfied beyond reasonable doubt, in the light of the evidence, as to the content of the videotape that there was "reasonable cause" for the arrest.

In these circumstances, I am satisfied that on this crucial aspect of the trial, the applicant can expect a fair trial.

In the event that the statement is not excluded, there is no basis, in my opinion, for suggesting that the applicant could not thereafter obtain a fair trial. Should the statement be excluded, having regard to the fact that the videotape was seen by three persons and having regard to the warnings that will be given to the jury in relation to identification evidence in general and specific warnings that may be given, having regard to the fact that the videotape has been lost, I am satisfied that the applicant has failed to discharge the onus on him in these proceedings of demonstrating that he would not have a fair trial.

Accordingly, I am satisfied that I must refuse the relief which is sought in these proceedings.