

**THE HIGH COURT****Record Number: 2005 No. 196 JR****Between:**  
**Gerard Hegarty**  
**Applicant****And****The Director of Public Prosecutions**  
**Respondent****Judgment of Mr Justice Michael Peart delivered on the 12th day of May 2005:**

This is an application by the applicant for an Order of Prohibition and/or an injunction to restrain the further prosecution of the applicant on a charge of assault causing harm contrary to s. 3 of the Non-Fatal Offences Against the Person Act, 1997, on the basis that two video tapes of the scene just outside the nightclub, near where the assault is alleged to have taken place, are now unavailable to the defence, and that the applicant cannot now receive a trial in due course of law, and that by reason of the fact that the Gardai have failed to secure and retain the videotapes. The charge arises out an alleged incident after the applicant had taken a lift in a car from the nightclub in Newmarket, Co. Cork on the 21st September 2003.

According to the grounding affidavit sworn by the applicant's solicitor on the 28th February 2005, the allegation as appearing from statements contained in the Book of Evidence is that the applicant had met the driver of the car, Mr O'Gorman and two named girls at the nightclub, and that "after leaving the night club they got into a motor car belonging to Joseph O'Riordan.....that it is alleged in the Statement of Joseph O'Riordan, that the applicant herein refused to get out of the car, and that he allegedly grabbed Joseph O'Riordan from behind and that he allegedly assaulted Jeanette O'Riordan, causing her to fracture her ankle....and hit her in the face. " This affidavit also states that it is alleged that the applicant took an iron bar from the car and attempted to assault the said Joseph O'Riordan, and that the iron bar was later taken from the applicant by passers-by and that he fled the scene.

The applicant's solicitor goes on to state that he has been instructed by the applicant that he denies assaulting either of the two complainants, and further that in fact the applicant had been asked by the complainants to go on to a party at a location called Boherbue, but that he had said that he would accept a lift to Charleville. He goes on to state that the applicant instructs him that when the driver failed to turn the car in the direction of Charleville he asked him to stop and let him out. He then states that he is instructed that the applicant was attacked by the one of the complainants, a girl in the front passenger seat, and that the other girl, in the back seat with him, also attacked him, and that the driver then stopped the car, got out of the car, went to the back door of the car where the applicant was sitting, and that he had an iron bar in his possession which he had taken from the front seta of the car. The solicitor then states that his instructions are that at this point the two girls came around to the back door of the car and assaulted him by punching him and attempting to drag him from the car, and that while this was happening the driver, Mr O'Riordan was standing behind them both holding the iron bar, and that the applicant then snatched the iron bar for the purposes of defending himself, whereupon there was a struggle for possession of the bar.

The two ladies who allege that they were assaulted by the applicant have made statements which are contained in the Book of Evidence. Ms. O'Gorman states that she and her sister had gone to a pub where they knew the barman, Joseph O'Riordan, who is the driver just referred to. They left there with him and all went to the nightclub where they met the applicant. They did not know him but he stayed in their company, but did not give his name. At about 3.45am they all left. It then appears that all got a lift from Mr O'Riordan in his car, and when they had moved away from the nightclub, she says that the applicant started trying to kiss her and that she told him to go away, and that he then tried to kiss another girl, at which point, she says, Mr O'Riordan stopped the car and "told him to get out", but that the applicant refused to do so. She says that at this point they were outside "Cronin's pub in Newmarket". She goes on to state that the applicant grabbed Mr O'Riordan by the throat, and was demanding a lift to Charleville. This lady then states that she got out of the car, but the applicant suddenly hit her in the face, and that she fell to the ground. She also says that her sister was being pulled by the hair, and recalls her lying on the ground being unable to get up. The Gardai were called.

Her sister, the other complainant also made a statement which is in the Book of Evidence. She does not recall very much except that she, her sister and Mr O'Riordan had gone to the nightclub where a band was playing. She remembers leaving the nightclub, but then states "I am sorry but the next thing I remember was lying on the road near the car. I was unable to

get up. I told Joe that I thought my leg was broken. I can't remember anything about the assault".

Joseph O'Riordan also made a statement. He says that when the "disco" was over he went to collect his car which was parked at the bottom of the carpark, that he drove back up to the door of the nightclub, where he pulled up so that the girls could get into the car, and that "a fellow got into the car with them and I assumed that he was with one of them". He then says that this "fellow" sat behind the driver's seat. He says that he then drove out of the top gate and had intended going to Boherbue. He then says that as he was driving into Newmarket he realised that this man was not with any of the girls in the back of the car, and that he asked the man to get out, but that he refused, saying that he would have to drive him to Charleville. He then describes in some considerable detail the assaults which form the basis of the charge brought.

It appears that two videotapes were viewed by the Gardai in the hope that it would show the locus of the alleged assault on the night in question. One video was from a Supervalu shop. This is located about 50 feet from the point where the assault took place. However, it did not show the applicant at all or indeed the locus of the assault. The other video was taken from the front of the nightclub itself, and according to the Gardai it showed the applicant talking to one of the complainants outside the door of the nightclub at 3.40am, and it then showed the applicant getting into the car being driven by Mr O'Riordan. When interviewed by the Gardai the applicant admitted being driven in Mr O'Riordan's car.

The Gardai did not take possession of the Supervalu tape since there was nothing of evidential value on it. They took possession of the nightclub video and forwarded same to the State Solicitor. It is averred that a couple of weeks later the tape was returned by the State Solicitor but apparently it has disappeared and has not been found.

The applicant alleges now that because he has been denied access to the videotapes, but presumably especially that from the nightclub, he is hindered in his Defence, particularly in relation to credibility. He is of the view that this video would support his contention that he was a welcome passenger in the car when he entered it, and the tape would support that view. In so far as it might be alleged that he was aggressive or forced the driver to drive him and so on, the applicant submits that this tape would be important as far as his credibility is concerned, both in that particular regard and generally. He says that he cannot now receive a trial in accordance with law, and that the prosecution have failed in their obligations to secure and retain for inspection the tapes in question and have compromised his right to a fair trial.

I do not propose to outline in any detail the case-law on the subject of the obligation resting upon the prosecution to secure and retain and disclose to the defence any evidence which might have a bearing on the issue of guilt or innocence, except to say that the Court was referred by Patrick McCarthy SC to the judgment of Hardiman J. in *Braddish v. DPP* [2002] ILRM 151, the judgment of the same learned judge in *Dunne v. DPP* [2002] ILRM 241, as well as the judgment of Kearns J. in *O'Callaghan v. The Judges of the DMD and DPP*, High Court, unreported, 20th May 2004, and that of Hardiman J. in *Scully v. DPP*, unreported, Supreme Court, 16th March 2005. In passing, I would add that Ms. Sunniva McDonagh BL on behalf of the respondent accepts the principles enunciated in these judgments, particularly those in *Braddish* and in *Scully*. It suffices to say for the purposes of this case that it is clear, and there could be no argument about it, that the obligation on the prosecution is to seek out and retain for the Defence any evidence which might have a bearing on the issue of guilt or innocence. In addition, as is made clear in *Scully*, it is not permissible that a video should be destroyed or rendered unavailable simply because a Garda has formed the view that it is of no evidential value or relevance.

## **Conclusion:**

It is clear first of all that the videotape in question was at one time in the possession of the Gardai, was viewed by them, and then retained and sent to the State Solicitor even though it was not considered to be of any evidential value since it showed only that outside the nightclub the applicant was talking to the complainant and showed him also getting into the car. The applicant has admitted getting into the car, so the video is not necessary for the purpose of helping to resolve any issue arising about whether he did or did not get into the car. That tape has been mislaid or lost. At any rate it cannot now be made available. There is no suggestion that it has been deliberately destroyed or rendered unavailable. Something accidental has occurred.

However, the important matter in this case is the fact that the assault is not alleged by anybody to have taken place outside the nightclub, being the location shown on the video in question. There is no dispute even by the applicant that the assault is alleged to have occurred after the car left the outside of the nightclub, and it was clearly out of the view of the video camera located at the nightclub. So the tape could not be said to be relevant or of evidential value in relation to the assault itself. What is contended is that its relevance is in relation to the credibility of the applicant in relation to his demeanour and behaviour as he got into the car, and perhaps the circumstances in which he entered the car outside the nightclub. But I have set out in some detail the contents of the statements of the two complainants and Mr O'Riordan for the purpose hopefully of showing that there is in fact no allegation contained in any of these statements which suggests even to the slightest degree that the applicant was not welcome into the car or that he behaved in any way against which he might have to or wish to defend himself. Nobody has said anything of that kind in their statement, and I have no doubt but that if any attempt was made by the prosecution to present any such evidence which goes beyond in any significant way what is contained in these

statements, objection would quite correctly be taken to such evidence being admitted. That being the case I cannot consider that the chances of the applicant receiving a fair trial are hindered in the slightest manner, since there is no allegation being made against which the video in question could be of the least assistance. IN these circumstances the video is of no relevance and does not touch upon the issue of guilt or innocence, or even credibility. I should say in passing also that no application was made to cross-examine Garda Bowe on his affidavit in which he states that the tape from Supervalu did not show anything of the applicant or the locus and that the other tape merely showed the applicant talking to one of the complainants and getting into the car.

I am completely satisfied that while in an ideal world it would be better if the video was retained safely and disclosed to the Defence in the usual way, the fact that it was accidentally mislaid or lost in this case has, in the particular circumstances outlined by me above, had no effect on the applicant's right to a fair trial in due course of law, since there is no aspect of his Defence, or indeed the prosecution's case to which the tape has any bearing or relevance.

There was a submissions made on behalf of the respondent in relation to the delay caused by the applicant by reason of his absconding in breach of his bail, and the effect of this on the obligation to retain the tapes in question, but in view of my findings in relation to the relevance of the tape evidence, I do not propose to deal with these submissions as it is unnecessary to express a view.

I therefore refuse the reliefs sought herein.