Neutral Citation Number: [2007] IEHC 124

THE HIGH COURT
JUDICIAL REVIEW

[2006 No. 613 JR]

BETWEEN

BRIAN PERRY

APPLICANT

AND
THE JUDGES OF THE CIRCUIT CRIMINAL COURT
AND
THE DIRECTOR OF PUBLIC PROSECTIONS

RESPONDENTS

Judgment of Mr. Justice McGovern delivered the 20th day of April, 2007

1. The applicant is charged with dangerous driving contrary to s. 53(1) of the Road Traffic Act, 1961 as amended. The charge arises out of an incident that took place at Gracepark Road, Dumcrondra, Dublin on the 21st June, 2004. The applicant was driving the vehicle at the time and there was a passenger in the vehicle, Ms. Rebecca Elliot who was a former girlfriend of the applicant. The incident was witnessed by Mr. James Higgins. In his statement to the Gardai he says:

> "In the early hours of Monday 21.06.2004, I was walking down Gracepark Road towards Church Avenue when I heard a car coming towards me like a bullet. I jumped over the garden wall on Gracepark Road as a I thought he was going to mount the foot path. The car passed me then and he was heading around a sharp bend. I knew by the speed he was going that he wouldn`t make it around the bend, seconds later I hear an unmerciful bang the car had gone into a skid and a screech coming to the bend. After hearing the collision I was unsure whether he had hit an oncoming car, a parked car or a house. I immediately ran back up the road to see an 02 silver Stilo after demolishing the front wall of a house on Gracepark Road and the car was on its side. This was about 3.05 a.m."

2. He goes on to describe the scene immediately afterwards.

3. Garda Seamus Bonar a Public Service Vehicle Inspector examined the vehicle on the 2nd June, 2004. In his report he describes the damage and says in conclusion:

> "No road test was possible due to the extent of the damage. The tyres fitted were inflated and in good condition with the exception of the right front which was deflated. The electrics were disarranged and could not be checked. Rear view mirrors and seat belts were fitted."

4. This report was not contained in the book of evidence as the State do not intend to rely, in the prosecution, on the condition of the vehicle. However, in accordance with established practice the statement was made available to the applicant. On the 7th July, 2004 the vehicle was destroyed. At that time the applicant had neither been arrested nor charged.

5. The applicant was served with a summons on the 10th February, 2005 to appear before the District Court on the 8th June, 2005. A book of evidence was served on the 18th July, 2005 and he was returned for trial before the Circuit Criminal Court on the 7th October, 2005. The matter appeared in the list for mention and to deal with procedural matters on several occasions.

6. On the 15th August, 2005 the applicant's solicitors wrote to the Chief Prosecution Solicitor asking him to provide disclosure of a number of matters including statements, and various other matters, including copies of the video tapes of interview of the applicant. The only request which might have any bearing on the vehicle was item number 4 in the letter which was "A copy of any technical or forensic evidence that the prosecution may wish to rely on". On the 23rd September, 2005 the applicant says that he instructed his solicitor that he believed the steering of the car had developed a fault and that this was the cause of the crash. On the same date his solicitor wrote to the chief prosecution solicitors referring to their letter of the 15th August, 2005 and repeating the request for the disclosure of the same items and added items 6 and 7 which were:

> "6. Any sketches photographs and maps of the alleged locus of the accident;
>
> 7. Any Engineers report that the prosecution may wish to reply on."

7. On the 22nd November, 2005 the applicant's solicitor sought confirmation whether a road worthiness test had been carried out on the vehicle in question and this request was repeated by letter of the 8th December, 2005. On the 23rd January, 2007 the second named respondent replied and the letter contained the following information:-

> "1. There were skid marks on the road going from the kerb on the opposite side of the road to where the car ended up on its side on the footpath outside 47 Gracepark Road. There are no documents or photographs in relation to this.
>
> 2. In relation to lighting on the road, the road was well lit on the night in question, and all the lights were working.
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> 3. There are no speed cameras on Gracepark Road.
>
> 4. There was a Public Service Vehicle examination of motor car registration 02 D 1644. We attach a copy of same.
>
> 5. There were no photographs taken at the scene.
>
> 6. There is a map of the scene, we expect this to be available in Court 8 tomorrow.
>
> 7. A medical report is contained in the book of evidence at page 8."

8. On the 24th January, 2006 the applicant's solicitors wrote to the chief prosecution solicitors asking that the vehicle is not disposed of and to confirm where the car was as they wished to arrange for an inspection to be carried out on it. On the 3rd March, 2006 the second named respondent wrote to the applicant's solicitor stating *inter alia*

> "Please note that after the road traffic accident on the 21st June, 2004 the Fiat Stilo motor car registration 02 D 16449

was taken to Gannons recovery yard. There was a PSV inspection of the car undertaken by Garda Bonar of the Carriage Office on the 26th June (report furnished with our letter of 23rd January, 2006). The motor car has since been taken to a breakers yard and disposed of."

9. It now appears that the car was taken to the breakers yard sometime in June 2004.

10. The applicant commenced these judicial review proceedings on the basis that there is a real risk that he would not receive a fair trial on the basis that he cannot properly conduct his defence in circumstances where he alleges that the steering on the vehicle locked and no engineers inspection can take place on behalf of the applicant. He says the Gardaí have a duty to preserve the vehicle and that their failure to do so amounts to a breach of the second named respondents common law obligation to preserve evidence potentially relevant to the issue of the guilt or innocence of the applicant. He also claims that he was entitled to be put on notice of any intention on the part of An Garda Síochána to destroy what was his property and that it ought to have been returned to him once the Gardaí decided it would not form part of the prosecution case.

11. On the 29th May, 2006 the applicant was granted leave to apply for judicial review for an order prohibiting his trial.

12. A number of affidavits were sworn in relation to this matter. An issue arose as to how the vehicle came to be disposed of. Two affidavits were sworn by Richard Slevin a salvage manager for Gannons City Recovery. In the first affidavit sworn in June, 2006 he said that he remembered a Fiat Stilo car registration number 02 D 16449 in Gannons yard where it had been brought following a crash on Gracepark Road on the 21st June, 2004. He stated at paragraph 3 of his affidavit:

> "I remember a date in early July when a man came to the yard. He told me he was Brian Perry and the owner of that motor vehicle. I remember that he took a child's seat from the back of the car.
>
> 4. I also recall asking him what he wanted to do with the car. His words were that he never wanted to see the car again and he walked away. I took this to mean that the car was to be destroyed. The roof had been cut off from the car in order to free a back seat passenger and it was very badly damaged and only good for salvage.
>
> 5. On the direction of Mr. Perry the car was taken to a breakers yard in Kilcock on the 7th July, 2004. I never heard from or saw Brian Perry again."

13. Rebecca Elliot who was a former girlfriend of the applicant and was a back seat passenger at the time of the crash swore an affidavit in which she stated that she telephoned Gannons recovery yard between approximately the 16th July, 2004 and early August 2004 in order to make inquires about getting her motor vehicle 02 D 16449 back from the yard. She wanted to have the car examined as she felt that the cause of the accident may have been a faulty steering column which locked. She claimed to be the owner of the vehicle. She said she was informed by someone in Gannons yard that they no longer had the motor vehicle and after a check was carried out by Gannons yard she was informed that the vehicle had been taken to another scrap yard. She asked why this had happened and was told that Gannons had got rid of the car as an Insurance Assessor had looked at it and Gannons had signed off on it. She claims to have told them they should not have got rid of the car. A week later the manager of Gannons yard got back to her and confirmed that the car was in a scrap yard and was still "intact" and that she could have it back if she paid a sum of €3,500 to cover the cost of storage since the date of the accident. She said she would not be able to afford this and that the manager told her he would make arrangements to get the car back from the yard and when he had it back he would contact her. She said she received no further contact with Gannons after this date as she was in the National Rehabilitation Hospital from the 16th July, 2004 until the 18th July, 2005. (Sadly Ms. Elliot was very seriously injured in the car crash and is confined to a wheelchair). She says there was no child's seat in the back of the car. The applicant and Rebecca Elliot had a child who was five years of age at the time and she said that she did not need a car seat. She sets out the circumstances in which she came to purchase the car and says that the applicant's name was put on the log book as it was cheaper for him to be a named driver on the insurance and for her to be joined on his insurance policy. It is worth pointing out that the applicant has also been charged with failing to have insurance at the time of the accident although this is apparently being dealt with summarily. An affidavit was sworn by Ms. Lisa Perry a sister of Rebecca who says she remembers going with her brother Darren to Gannons yard and that they searched the car for the childrens allowance book but were unable to find it. She says that she was certain that there was no child's seat in the car. In a supplemental affidavit Mr. Richard Slevin confirmed that a man and woman arrived at Gannons recovery yard and he remembers that they were looking for something to do with a child. He said it could have been a childrens allowance book but his recollection was that they were looking for a child's seat. He clearly recalled the young man saying he never wanted to see the car ever again and he understood that meant the car was to be destroyed.

14. The applicant claims that he never sought the destruction of the car or authorised its destruction.

15. I am satisfied that there was some confusion over what was to be done with the car and who gave the instructions with regard to the car. It seems to me that on the balance of probabilities someone came to Gannons yard and informed the staff there that they had no interest in the car and that the impression was conveyed to the personnel in Gannons recovery yard that they could dispose of the vehicle. There is no evidence that there was a conscious and deliberate attempt to dispose of the vehicle with a view to preventing it being used as evidence. It is clear that the prosecution never intended to rely on the condition of the vehicle in the prosecution of the applicant for dangerous driving.

16. Notice is to cross examine certain deponents on their affidavits were served by the parties. Although the respondents tendered a number of deponents including Mr. Richard Slevin counsel for the applicant said that he was instructed not to cross examine the deponents tendered on behalf of the respondents. Counsel for the respondents cross examined Ms. Rebecca Elliot. It is clear from her evidence that she was gravely injured in the crash and has commenced proceedings in which the Motor Insurers Bureau of Ireland is a defendant. She confirmed that she was not making any claim against the supplier of the car or the people who serviced the car. She said that even on the night of accident she was thinking about preserving the car and that her family were telling her to "leave it, that they can't get rid of the car, that the car would be there". Considering the gravity of Ms. Elliott's injuries I find it very difficult to accept that she would have been thinking of such things immediately after the crash. She confirmed that she did not have the vehicle examined for the purpose for the purpose of her personal injury case but says this is because Gannons were supposed to get in touch with her when they got back the vehicle but they did not do so. She denies having a conversation with her solicitor about locating the car or the importance of locating the car. Among the affidavits sworn in this matter is an affidavit of David Byrne who says that he was working as service manager for Donohoe's Motor City and that on the 1st December, 2003 the applicant purchased the car in question which was sold under warranty. He says that on the 10th February, 2004 the applicant brought the car to their garage because he stated there was a fault with the steering. He says that the steering column was replaced. He said that subsequently the applicant returned three times to their garage between the 10th February, 2004 and the 21st June, 2004 complaining of problems with the air bag and complaining of issues concerning the paint on the vehicle. On none of these occasions

did the applicant make any issue regarding the steering. Mr. Byrne's says that if there had been any further complaints about the steering these would have been addressed in the context of the warranty. He said that if there was a problem with the steering on a Fiat Stilo there would have been an indictor light and a message to contact the dealer. If the steering column did fail you would still be able to steer the car without power steering but it would be heavier.

17. It is clear that the prosecution are not relying on any defect in the vehicle. The applicant claims that there is a real and substantial risk that he cannot have a fair trial because of the absence of the vehicle.

18. In *Z v. Director of Public Prosecutions* [1994] 2 I.R. 476 at 494 Hamilton P. stated

> "To justify a permanent stay of criminal proceedings, there must be a permanent defect which goes to the root of the trial of such a nature that nothing a trial judge can do in the conduct of the trial can relieve against its unfair consequences."

19. In *Z v. Director of Public Prosecutions* [1994] 2 I.R. 476 at 506 Finlay C.J. said

> "This court in the recent case of *D. v. Director of Public Prosecutions* [1994] 2 I.R. 465 unanimously laid down the general principle that 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 real risk that by reason of those circumstances… he could not obtain a fair trial."

20. He went on to state at 507:

> "With regard to the general principles of law I would only add to the principles which I have already outlined the obvious fact to be implied from the decision of this court in *D. v. Director of Public Prosecutions*, that where one speaks of an onus to establish a real risk of an unfair trial it necessarily and inevitably means an unfair trial which cannot be avoided by appropriate rulings and directions on the part of the trial judge. The risk is a real one but the unfairness of trial must be an unavoidable unfairness of trial".

21. In *D v. Director of Public Prosecutions* [1994] 1 I.L.R.M. 435 Denham J. stated at 442:

> "The applicant's right to a fair trial is one of the most fundamental constitutional rights afforded to persons. On the higher hierarchy of constitutional rights it is a superior right.
>
> A court must give some consideration to the community's right to have this alleged crime prosecuted in the usual way. However, on the hierarchy of constitutional rights there is doubt that the applicant's right to fair procedures is superior to the community's right to prosecute."

22. I have been referred to the case of *Braddish v. DPP* [2001] 3 I.R. 127 and a number of other cases dealing with the failure to preserve evidence. In my opinion the facts in this particular case have to be looked at in context. In this case there was an examination of the vehicle and a report was prepared by the PSV Inspector. It is clear that the State do not intend to rely on evidence that there was a defect in the vehicle which is relevant to the charge. The PSV Inspector's report makes it clear that no road test was possible due to the extent of the damage. In the light of that evidence it is difficult to see what information the applicant could have gleaned from the remains of the vehicle to assist him in his defence. But even if there was a possibility that he might have been able to adduce some evidence from an examination of the remains of the vehicle by an expert called on his behalf it does not follow that he cannot have a fair trial by the absence of such evidence or that he meets the test set out by Finlay C.J. in *Z. v. D.P.P.* The State is this case rely on the evidence of an eye witness who says that the vehicle in question was being driven at great speed. If the matter proceeds to trial it would be a matter for the jury to assess the evidence of that witness who can be cross examined by counsel for the applicant. In the case of *McFarlane v. DPP* (Unreported, Supreme Court, 7th March, 2006) Hardiman J. stated at page 15 of his judgment that in order to demonstrate the risk of an unfair trial as ennunciated by Finlay C.J. in *Z v. DPP* "… there is obviously a need for an applicant to engage in a specific way with the evidence actually available so as to make the risk apparent. A failure to do this was the basis of the failure of the applicant in *Scully* [2005] 1. I.R. 242. This is not a burdensome onus of proof: what is in question, after all, is the demonstration of a real risk, as opposed to an established certainty, or even probability of an unfair trial."

23. The applicant says that until he was charged he had no reason to believe that the condition of the vehicle might be of relevance to him. I find it hard to imagine that the applicant would not have apprehended that he would be charged with a driving offence arising out of the incident or at the very least would be sued by his passenger for the grievous injuries which she suffered. In those circumstances if the applicant was alleging that the crash was caused by a defect in the steering or some other defect in the vehicle one would have expected him to raise this point early on. Mr. Richard Slevin was never cross examined on his affidavits in which stated that he was told, or at least given the impression, that the vehicle could be destroyed and that the applicant had no interest in it. He was available for cross examination on his affidavits but counsel for the applicant was instructed not to cross examine him or any other witnesses on behalf of the prosecution who had sworn affidavits and on whom notice to cross examine had been served. There was a complete contradiction between Mr. Slevin and the applicant as to the circumstances in which the vehicle was sent off to be scrapped yet he choose not to cross examine Mr. Slevin on his account. In paragraph 10 of his affidavit sworn on the 4th October, 2006 the applicant says *inter alia*

> "I say that it was only when I was charged with the offence of dangerous driving causing serious injury… and met with my legal advisors and gave instructions to them that it became apparent that it would necessary to have an Engineers inspection carried out on the said vehicle in preparation for your deponents defence of the case especially in view of the fact that your deponent feels that the steering locked and your deponent experienced stiffness/heaviness with the steering wheel prior to the accident. I say that is your deponent's belief that the accident was caused as a result of a problem with the steering of the car and not as a result of speed…"

24. The applicant fails to set out in any detail how the car was affected immediately prior to the accident and did not attempt to give any indication of the speed at which he was travelling despite the evidence in the book of evidence from an independent witness that the vehicle was travelling at great speed. It is hard to imagine that if that was the cause of the accident he would not have mentioned it to his former girlfriend Ms. Rebecca Elliot who was grievously injured in the crash. Yet in her claim I am told there is no allegation that the steering was defective and no party was joined in the proceedings against whom such an allegation was made. In the particular circumstances of this case I think there was excessive delay on the part of the applicant in seeking inspection of the vehicle and I am not satisfied that the members of An Garda Síochána are in any way to blame for the destruction of the vehicle.

25. In my view there is ample evidence on which this trial can proceed without the vehicle being available to the applicant. The crash occurred on the 21st June, 2004 and the summons was served on the 10th February, 2005. It was only at that stage the applicant raised the issue of a defect in the steering and it was only on the 24th January, 2006 that his solicitors asked that the vehicle should not be disposed of. If there was no eye witness statement the absence of the vehicle might assume a greater importance but one way or another the applicant has to deal with the issue raised by the eye witness who says the vehicle was being driven very fast and that he knew it was not going to make it around the sharp bend that it was approaching. The applicant has not engaged with that evidence in any meaningful way in his application to prohibit his trial. I am quite satisfied that a trial judge acting correctly will be able to deal with any deficiencies in the evidence which might arise and that it can in no way be said that the absence of the crashed vehicle means that he could not obtain a fair trial.

26. Accordingly I refuse the relief sought in this matter.