Neutral Citation Number: [2007] IEHC 64

THE HIGH COURT

JUDICIAL REVIEW

[2005 No. 1378 JR]

BETWEEN

LIAM TOOHEY

APPLICANT

AND
THE DIRECTOR OF PUBLIC PROSECUTIONS
AND THE JUDGES OF THE CIRCUIT COURT

RESPONDENTS

Judgment of Mr. Justice Charleton delivered on the 17th day of January, 2007

Prohibition

1. The jurisdiction of the High Court to prohibit a criminal trial should be exercised with great caution. An application for that remedy should succeed only in exceptional circumstances. The constitutional scheme for the disposal of criminal business contemplates that the prosecuting authority, in virtually all cases the Director of Public Prosecutions, should be trusted to make a decision as to whether to commence a prosecution against an individual. Apart from the rights of the accused, the entire community is injured by the commission of any criminal offence. The people of Ireland, therefore, as well as having prosecutions in indictable crime brought in their name, also have an interest in the disposal of criminal trials in a fair and rational manner. In serious cases it is for a jury of 12 peers of the accused to decide whether there is sufficient evidence to prove, beyond reasonable doubt, the guilt alleged as to the commission of a criminal offence. Dealing with the duty of the High Court to exercise the remedy of prohibition sparingly in this context, Denham J. in *D.C. v. DPP* [2005] IESC 77, November 21st, 2005, said:-

> "However, bearing in mind the duty of the courts to protect the constitutional rights of all persons, in exceptional circumstances the court will intervene and prohibit a trial. In general such a step is not necessary as the trial judge maintains at all times the duty to ensure due process and a fair trial. The basic assumption to apply in relation to all pending trials is that they will be conducted fairly, under the presiding judge. However, in circumstances where there is a real or serious risk of an unfair trial the courts will intervene so that a defendant may not be exposed to the commencement of the process, it being the assumption that should such a trial commence it will be stopped by the direction of the trial judge because of the real or serious risk of an unfair trial… Such a jurisdiction to intervene does not apply where the applicant has minutely parsed and analysed the proposed evidence and sought to identify an area merely of difficulty or complexity. The test for this Court is whether there is a real risk that by reason of the particular circumstances that the applicant could not obtain a fair trial."

2. In this regard, the Supreme Court has made it clear that the onus of proving that a trial, should it occur in the circumstances complained of in judicial review, will be unfair rests upon the applicant; *Z. v. DPP* [1994] 2 I.R. 476 at 506, *Bowes v. DPP* [2003] 2 I.R. 25 at 35. Further, the full test to be applied is whether the risk of an unfair trial would prevail despite appropriate rulings and directions by the trial judge; *D.C. v. DPP* [2005] IESC 77. In the context of giving the appropriate test an interpretation which meets the demands of an ordered society, Hardiman J. explained in *Dunne v. DPP* [2002] 2 I.R. 305, that when it comes to a duty of preserving evidence or, I would infer, discovering whether the absence of evidence that once existed, for example through the death of a witness, has the result of creating the risk of an unfair trial that "no remote theoretical or fanciful possibility" should lead to the prohibition of a trial. Consequently, the duty of the High Court in considering an application for prohibition is to consider whether the burden of proof has been discharged by the applicant in accordance with this test; *Scully v. DPP* (Unreported, High Court, November 21st, 2003), *Mitchell v. DPP* [2002] 2 I.L.R.M. 396. Hardiman J. summarised this issue in *McFarlane v. DPP* [2006] IESC 11 when he said:-

> "In order to demonstrate that [there is a risk of an unfair trial] there is obviously a need for the 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."

The Evidence

3. In this case a horrific road accident took place between a lorry and a car on 9th November, 2004, at Campile in Wexford. In consequence of it, three charges were brought against the applicant, who was driving the lorry, of dangerous driving causing serious harm contrary to s. 53 of the Road Traffic Act, 1961, as amended, of simple dangerous driving and of driving a vehicle with a worn tyre. The photographs taken in the aftermath of the incident, and the relevant Garda sketch map, would appear to show that the lorry driven by the applicant ended up on the wrong side of the road and crashed into a ditch. It is doubtless that Alan Kavanagh, the driver of a family car, was very seriously injured and had to be cut from his vehicle, which on the photographic evidence, was a mangled wreck. He and his daughter were immediately removed by ambulance to hospital. It would seem that within days of the accident, the lorry that the applicant was driving was returned to his employer, on whose behalf he was driving it, and was then extensively repaired involving at least the replacement of its front portion and the replacement of tyres. The accused was arrested on 30th November, 2004 and a cautioned statement was taken from him. During the course of other interviews in Garda custody he either exercised his right to silence or gave non-committal answers. The charges were laid in April, 2005 and a book of evidence was served the following month. On 22nd September, 2005, a statement from a public services vehicle inspector was served on the accused. (That Garda is the expert from within An Garda Síochána who is trained to examine vehicles with a view to the interpretation of their condition relevant to possible civil or criminal trials.) Photographs were served that same month and the case was listed for trial on 4th October, 2005, at Wexford. It was in or around that time, apparently, that the solicitor on behalf of the applicant thought of having the vehicle in which the applicant was driving examined. He also sought to examine the wreck of Mr. Kavanagh's car. The latter was available but the former was not. It was submitted in argument, reasonably I think, that whereas one might find out from the garage which repaired the lorry some information as to what needed to be done to it to make it roadworthy again, their focus would have been on the reinstatement of the vehicle as a working lorry and that they would have had neither the competence nor the inclination to notice items of evidence that could be of use in establishing a defence by the accused.

4. The entire book of evidence was opened to me, as were the exhibits. Mr. Kavanagh has no recollection of how the accident occurred and his daughter is not listed as a witness. The Garda sketch shows an apparent skid mark from one of the front wheels of the lorry, in fact the one alleged to be bald, going from the applicant's correct side of the road and over on to the wrong side of the

road. The applicant in his statement claims no knowledge of how the accident occurred apart from the fact that he felt a collision with the bank on his own side of the road and, following that, claimed only to notice a glancing blow by the car. When, or how, or even if, he went out of control is left un-stated. Such is his apparent answer to the charges.

5. The facts alleged in any expert report, and the opinion proffered in accordance with the exception to the law of evidence that allows an expert to interpret evidence, is subject to cross examination and debate in any trial. In a report from Paul Roels, a technical engineer, dated 12th December, 2005, he claims that had the vehicle driven by the applicant been available to him for inspection, that mud and branch deposits might have been visible on its passenger side which could support the applicant's case. In addition, the nature of the indentation and paint traces from both vehicles might have been capable of an interpretation favourable to the applicant. Finally, he said that the absence of a tyre on the truck, namely the one in respect of which the bald tyre charge is brought, leaves him with no reasonable chance of refuting the evidence upon which that charge is based, namely that of a Garda officer who said that there was a millimetre of thread only on its surface.

The Arguments
6. The applicant argues for an order that the court should prohibit the trial from proceeding. Counsel says that the failure to have the item of material evidence available, in the shape of the truck for inspection, renders it possible that a defence that the accused wishes to mount, through cross examination or through evidence, has now become more difficult. The respondents say that the unavailability of this material evidence results from no fault on the part of An Garda Síochána, and that on the contrary they acted reasonably and in a practical way. They argue that the applicant, legally advised as he undoubtedly was during his arrest and interrogation in November, 2004, should have known that the truck would be material evidence at a trial, and that an expert might be required to inspect it. Therefore, he should have made a request. It is contended that the applicant's right to judicial review should be barred by his failure to bring the case at the first reasonable opportunity. Time, in that regard, under O. 84 of the Rules of the Superior Courts, runs according to the respondents from when the charges were laid in April, 2005, and according to the applicants, from when it was discovered that the vehicle was not available for inspection, which is October, 2005. As a matter of fact, the proceedings herein were commenced on 19th December, 2005. Under O. 84 of the Rules of the Superior Courts, an applicant for judicial review must bring a case promptly. I know of no cases where an applicant who has brought proceedings for judicial review has been disentitled by reason of delay where the case was commenced within the time limits set out, save where a third party's rights have been prejudiced. On the contrary, there are many cases where the delay has much exceeded the relevant time limits and nonetheless an order has been granted. In dealing with this case I am adopting the statement made by Fennelly J. made in *De Róiste v. Minister for Defence* [2001] 1 I.R. 190 at 221 where he said:-

> "The complaint made by the applicant is one which, if established in a timely fashion would (if not successfully controverted by the respondent) entitle him to relief ex *debito justitiae*. He was bound, however, to apply 'promptly'. Furthermore, he was bound, at least *prima facie*, to apply for an order of *certiorari* of the decision within six months of its making and otherwise, to explain his delay and show that the delay was justified. In the nature of things, a short delay might require only slight explanation. The judicial review time limit is not a limitation period. Prompt pursuit of a remedy is, however, a requirement of a judicial review application. A longer delay will require a more cogent explanation. Explicable delays have usually been a matter of months and very rarely years."

Preserving Evidence
7. An accused at a criminal trial has a fundamental right to have the case disposed of reasonably quickly. It is of the nature of life that witnesses' recollections fail, people die or become sick and, as time goes on, items tend to get moved around or lost. It is not my purpose in this judgment to attempt to analyse all of the circumstances in which prohibition of a criminal trial should be granted by the High Court by reason of the disappearance of evidence. From the cases opened, however, a number of principles are, it seems to me, established:-

> 1. Simply because of the death of a witness, or the disappearance of an item of evidence, a real risk of an unfair trial is not automatically established. The witness may be a prosecution witness and, on a fair analysis, do nothing but damage to the defence cause. The creating of fanciful notions of the witness might speak up for the defence, or in some way establish the destruction of the charge, are insufficient.
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> 2. Similarly, where an item of physical evidence goes missing, its absence must be shown to affect any possible defence that might be mounted by the accused in a material way.
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> 3. The burden of proof is on an applicant seeking prohibition to show that what he complains of constitutes the creation of a real risk that his trial will be unfair.
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> 4. An Garda Síochána is obliged to act reasonably and practicably in investigating cases by way of gathering evidence that may establish the prosecution's case or damage it through showing the reasonable possibility of a defence for the accused. This may include the preservation of some items of material evidence. For instance, statements taken down in writing from an accused person in Garda custody will be required at trial because the later examination of pages may show, as has happened, two different versions of the same interview notes. Other things found may be recorded, as opposed to kept. Experts, such as a forensic pathologist, may be called in whose job of recording is thorough enough to allow a debate only as to the conclusion.
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> 5. The duty to preserve items of physical evidence is not unlimited. No one, for instance, thinks of preventing a burial or cremation for fear that the defence may require to examine the corpse of a murder victim months or years later. Often, the duty to take reasonable and practicable steps to gather evidence is fulfilled through an examination by an expert, through the taking of photographs or the making of a sketch or recording.
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> 6. Where, however, it comes to the interpretation of a road traffic accident, the case law opened to me seems to establish that fairness can require at least the possibility that in many cases a defence expert should see and report on relevant portions of the vehicles involved in a collision. The duty here would seem to go beyond the duty, for instance, to simply photograph a fingerprint for later interpretation, as opposed to cutting a pane of glass out of a window and producing it in court or for the inspection of a defence expert.
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> 7. In this regard, the defence have a role to play. Usually they are legally aided. They are not entitled to expect that the prosecution will do everything. Theirs is a duty to engage in the criminal process and to request items that may be material to undermining the prosecution case or establishing a defence through engaging with the prosecution in a practical and timely way.

8. In the absence of an accused, or potential accused, having legal advice available to him, it is hard to ascribe the dynamism and expertise that is expected of a criminal lawyer and to find fault in that regard with his failure to engage.

Application to Road Traffic Cases

8. In the course of his judgment in *McFarlane v. the DPP* [2006] IESC 11 at p. 17 of his judgment, Hardiman J. quoted with approval from *McGrath* on evidence (Dublin 2004) at p. 691:-

> "A material object is any object, the existence, appearance or condition of which is relevant to the issues in a case. Common examples would include the alleged murder weapon in a murder case, stolen goods in a prosecution for receiving stolen goods and the product in a products liability case. In general such objects are produced in court for inspection and examination by the Tribunal of Fact. However, where it is not possible or practical to produce the actual object, secondary evidence of it may be adduced. This may take the form of photographs or films of the object or the oral evidence of someone who had seen it."

9. I also approve this passage as being a correct statement of the law. In serious road traffic prosecutions, the production of vehicles to the court is not necessary. However, the defence may, in some cases, reasonably need to get an expert to inspect them or the relevant portions of vehicles may be kept for that purpose. This requires the cooperation in a swift and reasonable manner of the defence solicitor.

10. This case, however, is unfortunately the third within a three year period that must declare that the early disposal of vehicles involved in a collision, out of which charges are brought or maybe brought, and in respect of which no defence expert has had a chance of examination, is wrong. The last of these cases was *Ludlow v. the DPP* [2005] IEHC 299. That concerned another dreadful crash on 8th October, 2002, which resulted in the death of Darren O'Neill. It is another case where the applicant's lorry was alleged to have been on the incorrect side of the road; allegedly worn tyres were also alleged to have been involved. These were not available, when sought. There, the case was made that the applicant was fully aware that the vehicle and tyres had been returned to its owner and it was said that it would not be practicable or feasible for the Gardaí to seize and retain tyres pending the completion of a prosecution. In fact, it was well over a year after the accident before a request was received by or on behalf of the applicant for any form of inspection. Dunne J. decided that it was central to the prosecution for dangerous driving causing death as to whether the condition of the tyres were excessively worn. She had no doubt as to the importance in that case, of the tyres for the purpose of permitting a forensic examination to be carried out with a view to obtaining evidence which might rebut the technical evidence proposed to be adduced by the prosecution. Therefore, there was a duty to preserve the tyres. On the facts, there was no evidence before her to suggest that it was not possible to do so. On the issue of the delay, Dunne J. stated:-

> "There is undoubtedly some degree of delay involved in making the request for inspection but I cannot conclude that the delay was of such a degree as to disentitle the applicant to relief. It is notable that the Gardaí were just as slow in responding to the request as the applicant's solicitor was in seeking the opportunity to inspect. Further, it should be noted from the information before me, it seems that the tyres were disposed of by the vehicle's owner shortly after the vehicle was returned to him. Accordingly, no matter how speedy the applicant's solicitor was in making a request to inspect the tyres, it would have been of no avail. Finally, on this point, I do not think that the fact that the applicant was aware of the return of the vehicle on the evening in question to the owner in some way removes the duty on the Gardaí to preserve the evidence."

11. I find myself in a position where these principles are directly applicable to this case.

12. The leading case in this matter is the decision of the Supreme Court in *James Bowes v. DPP, Deidre McGrath v. DPP* [2003] 2 I.R. 25, the judgment having been given on 6th February. In relation to the case of the accused Bowes, the Supreme Court refused to order the prohibition of a trial in a drugs possession case. He was allegedly the driver of a car in which the drugs were found and the car was disposed of. There was no unfairness in the Gardaí examining the car and then disposing of it. In any criminal case an argument could be made that an examination of a scene or object might have uncovered fingerprints, or hair traces, or traces of drugs, the presence, or the absence of which, might undermine a case or plant a seed of doubt in the mind of a jury. However, the drugs had nothing to do with the car apart from having been carried in it, or concealed in it. Arguments that fingerprint examinations that were negative ought to result in photographs or defence expert evidence are the essence of typical argument that goes on in criminal trials. These are matters to be sensibly left to the adjudication of a jury deciding the issue as to whether the prosecution has produced sufficient evidence to prove the guilt of the accused on any particular charge beyond a reasonable doubt. People have to get on with their lives, reoccupy their premises, bury the dead and reopen their businesses. This means that the Gardaí have the task of recording relevant items, perhaps keeping some, and leaving the interpretation of photos and other means of recording items to the trial process. They should take professional steps that are reasonable and practicable. The trial judge can sensibly control these issues by excluding irrelevant evidence or argument and juries are in the best position to see whether there is any sense being put before them, by either side. In the case of *Deirdre McGrath v. the Director of Public Prosecutions*, however, the applicant had been charged with dangerous driving causing death. The Gardaí had seized the motor cycle of the deceased and had carried out a forensic examination. They had parted with possession of the motor cycle about two and a half months before the judicial review proceedings were instituted, and without notifying the applicant. Then, when proceedings had been commenced, the applicant retained a forensic expert to examine the motor cycle which was not then available. Dangerous driving causing death cases can be circumstantial or based on the direct perception of witnesses. The Supreme Court held that a technical examination of the missing motor cycle on behalf of the applicant was a request that was important; it would have offered the accused the reasonable possibility of rebutting the evidence proffered against her. On behalf of the Supreme Court, Hardiman J. stated:-

> "The fundamental fact is that the Gardaí, having themselves thought it important to take possession of the motorcycle and have it examined for their purposes should have retained the vehicle until the conclusion of any proceedings. Instead, they parted with it before they knew whether there would be any proceedings or not. The rate of deconstruction of the bike after that happened was a matter of chance. If, by chance, it had been intact in February, 2000, [the applicant] would have no legal cause of complaint about the fact that the Gardaí had parted with it. As it is, however, there is no contradiction of Dr. Jordan's evidence as to the pointlessness of examination and the position has not, in my view, been retrieved."

13. The Supreme Court concluded, in terms which I am bound to follow, that prohibition had to be granted in that case. The conclusion of Hardiman J. at p. 41 of the judgment cannot be distinguished, in any material way, from the facts in this case:-

> "Accordingly, I conclude that Ms. McGrath has suffered the loss of a reasonable prospect of obtaining evidence to rebut

the case made against her by reason of the Gardaí having parted with the motorcycle. I do not consider that, by delay or otherwise, she has disentitled herself to relief. This leads to the conclusion that the respondent's further prosecution of her should be restrained. I am conscious of the fact that this in turn would mean that serious allegations, arising out of an accident which resulted in fatality, will not be litigated to a conclusion, because of the risk of unfairness. Dangerous driving causing death is an offence whose seriousness has been underlined by the fairly recent increase of the maximum penalty to ten years imprisonment. Experience shows that it is almost unique, amongst offences not requiring a specific intent, in carrying a real possibility of a significant custodial sentence for a convicted person of good character. One would hope that its very seriousness would, in future cases, ensure that items of manifest evidential potential are properly preserved. These two cases tend to indicate that there may be a need for a more cohesive practice among the Guards in the preservation or disposal of pre-trial of evidence which is potentially relevant to the defence in criminal proceedings. The adoption and observance of suitable guidelines might assist in avoiding pre-trial litigation of this nature."

Conclusion

14. I am bound by the judgments quoted to prohibit the trial of the applicant. This is a case which was straightforward and would normally have been decided through an oral judgment delivered on the date. I have reserved it because I am taking the unusual step of requiring that the registrar of the court should draw it to the attention of the relevant authorities in its physical form.

15. It may not be that in every case that involves a road traffic collision, that all of the vehicles involved need to be preserved indefinitely until the conclusion of a criminal trial. I do not read the Supreme Court in *McGrath's* case as saying that. What is required is a reasonable opportunity for an expert on behalf of the defence to examine vehicles. Possibly at the request of an expert, or by decision of the Gardaí, certain portions of a vehicle, such as its tyres, or relevant paint scrapings, might be preserved. The duty on the investigating and prosecuting authorities must be, however, in such cases, to create a circumstance whereby such an inspection will become possible. I note the absence of guidelines, as suggested by the Supreme Court in that case. If same exist, then they certainly were not applied in this case. What might be suggested is that vehicles should be preserved until charges are proffered and thereafter that a timely opportunity be given to the defence to request an expert to inspect. The defence must then respond by cooperating fully and fairly if their opportunity is not to be lost. If there is a refusal, or no inspection within a reasonable time limit, say of two months, that should be the end of the matter. Where an expert has inspected and reported on the matter, that document will be available to the defence and, in the event of the untimely death or illness, for instance, of the expert, available to any other expert they might wish to appoint who can give his opinion on the physical finding therein set out. The greater use of detailed photographs and video recording might also be of assistance. But these are practical matters to be worked out.