Neutral Citation Number: [2005] IEHC 185

THE HIGH COURT
JUDICIAL REVIEW

[2002 No. 488 JR]

BETWEEN

JOHN KELLY

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Quirke J. delivered on the 17th of June, 2005.

By order of the High Court (Peart J.) dated the 31st July, 2002, the applicant was given leave to apply by way of judicial review for orders prohibiting the respondents from proceeding further with the trial of the applicant on foot of bills of indictment whereby the applicant is charged with the commission of offences contrary to the provisions of the Misuse of Drugs Act 1977.

It is claimed on behalf of the applicant that he cannot receive a fair trial in due course of law in accordance with the provisions of Articles 38.1 and 40.4.1 of Bunreacht na hÉireann because the Gardaí who investigated the offences with which he has been charged, failed to lift, to retain and to properly preserve fingerprints and palm marks from:

(1) the applicant's motorcar, including the steering wheel and dashboard of the vehicle and

(2) the outer packaging surfaces of parcels of cannabis resin which were recovered at or near the location where the offences were alleged to have occurred on 12th May, 1997.

It is contended that the absence of these fingerprints and palm marks has given rise to a real and serious risk that the applicant, who has already been tried in respect of the charges and now faces a retrial, will not receive a fair retrial in respect of the offences alleged against him.

FACTUAL BACKGROUND

1. Between the 10th and 15th July, 2000, the applicant stood trial in the Dublin Circuit Criminal Court in respect of the alleged commission of four offences contrary to the provisions of the Misuse of Drugs Act 1977 (as amended).

(a) Two charges alleged possession by the applicant of controlled drugs in or about the N4 Chapelizod By-Pass in an area known as Long Meadows in the city of Dublin on 12th May, 1997:

(i) s*impliciter* contrary to sections 3 and 27 of the Act of 1977 and

(ii) for the purpose of selling or otherwise supplying contrary to sections 15 and 27 of the Act of 1977.

(b) Two further charges alleged possession by the applicant of controlled drugs at St. Lawrence's Road in the city of Dublin on 12th May, 1997:

(i) simpliciter contrary to sections 3 and 27 of the Act of 1977 and

(ii) for the purpose of supply contrary to sections 15 and 27 of the Act of 1977.

On the 15th July, 2000, the applicant was convicted of the two offences outlined at (a) above, i.e., possession of two five kilogram bags of cannabis resin. The bags had been found buried in a wooded area known as Long Meadows in the City of Dublin on 12th May, 1997.

On the same date and within the same trial, the jury failed to agree upon a verdict in respect of the two charges outlined at (b) above which alleged possession by the applicant of two smaller packages containing cannabis resin.

2. On 21st March, 2002, the Court of Criminal Appeal quashed the convictions in respect of the charges outlined at (a) above on grounds that the cross-examination of the applicant at the trial was improper and impermissible having regard to the provisions of s. 1(f) of the Criminal Justice (Evidence) Act 1924.

The judgment of the Court of Criminal Appeal (Fennelly J.) referring to the charges which are the subject of these proceedings concluded in the following terms:

> *"Now it is said on the other hand on behalf of the prosecution that the evidence supporting...(the charges) ... is independent. So the court was being asked to comment in effect on the prejudicial effect of the evidence in relation to the other two counts, ... and on another issue, which I will mention but will make no comment on, and that is the fact that although the Gardaí had seen the two bricks or blocks of cannabis being thrown away and they were wrapped in plastic, no fingerprint evidence was obtained or certainly no attempt was made to obtain it early enough to ensure that such evidence would be available. The court does not think it is desirable that there should be any comment on that matter because the court has decided that, while the conviction should be set aside on counts 3 and 4 there should be a new trial, and as it is a matter of course for the Director of Public Prosecutions as to what steps he takes in relation to the new trial this court should not prejudice any of those matters. Accordingly the order will be that the conviction be set aside and a new trial directed."*

3. Evidence was adduced at the applicant's trial that Gardaí Lenehan and Shortt saw the applicant throwing parcels into a grassy area near the entrance of Long Meadows Park. Those parcels were allegedly retrieved by the Gardaí and found to contain cannabis resin.
Subsequently two other larger parcels, each containing five kilograms of cannabis resin, were found buried within the ground in Long Meadows Park approximately a half a mile from the entrance to that park.
Forensic evidence was adduced which linked the buried parcels with the applicants BMW car which was found by the Gardaí parked on a road some distance from the entrance to the park. The links included the following:

(a) blue carbon paper found at the location where the parcels were buried and in the trunk of the applicant's car,

(b) a swatch or tab from a bag which was common to evidence found at the location where the parcels were buried and to the motor car and

(c) soil taken from the applicant's shoes at the time of his arrest which matched soil at the location where the parcels were found and soil found within the trunk of the applicants vehicle.

The charges outlined at (b) above alleged possession of the (smaller) packets which the Gardaí claimed to have seen the applicant thrown away into a grassy area and which they allegedly retrieved. The jury were unable to agree a verdict in relation to those charges.
The charges alleged at (a) above relate to the larger packets which were found buried within Long Meadows Park about a half a mile from its entrance. The Court of Criminal Appeal has ordered that the applicant be retried in respect of the commission of those offences.
4. Francis O'Reilly testified at the applicant's trial. He confirmed that he had been in possession of the cannabis with intent to supply it to persons other than the applicant. He agreed with and corroborated the applicant's testimony that the applicant had lent his car to Francis O'Reilly in order to collect an assignment of illicit jeans for which the applicant intended to pay in cash. A large sum of cash was found in the applicant's possession.
Francis O'Reilly accepted his involvement in drug dealing. He stated
that he was addicted to drugs himself. In evidence he admitted placing the parcels of cannabis where they were found by the Gardaí and burying the additional parcels at the location where they were found buried.
5. At the trial, evidence was adduced indicating that the wrappings of the parcels recovered at the scene of the crime were examined for fingerprints at a very late stage and after they had been opened by the Gardaí. When they were eventually sent for analysis, no fingerprints were recovered on the parcels. Evidence was adduced at the trial indicating that such was the case.
6. During the trial, the applicant's counsel relied upon the absence of fingerprint evidence in support of the contention that the State had not discharged the onus of proving the commission of the offences according to the criminal standard of proof as required by law.
On appeal to the Court of Criminal Appeal, it was contended on behalf of the applicant that his conviction was unsafe *inter alia* because *"... no fingerprint evidence was obtained or certainly no attempt was made to obtain it early enough to ensure that such evidence would be available..."*. (See page 4 of the judgment of the Court of Criminal Appeal).

THE APPLICANT'S CLAIM

The applicant claims that the failure by the Gardaí to preserve the fingerprints and palm marks from the motorcar and the outer packaging surfaces of the parcels has exposed him to the risk of an unfair retrial.
It is contended on his behalf *inter alia* that:

> *"It is the duty of the gardaí arising from their unique investigative role, to seek out and preserve all evidence having a bearing or potential bearing on the issue of guilt or innocence. This is so whether the prosecution proposes to rely on the evidence or not, and regardless of whether it assists the case which the prosecution is advancing or not."*

(See *Braddish v. Director of Public Prosecutions* [2001] 3 I.R. 127 at page 133 (per Hardiman J.).
Mr. O'Carroll S.C., on behalf of the applicant, contends that clear and unequivocal evidence of the absence of the applicant's fingerprints on the surface of the wrappings would have created a substantial doubt in the minds of the jurors sufficient to cause them to question seriously the evidence upon which the State relied in support of the charges preferred against the applicant. He says that the failure of the State to seek and obtain this evidence at an early stage in the investigation has cast doubt and ambiguity upon the final fingerprint evidence which was adduced at the trial and will be adduced at the retrial.
It is alleged that this failure and breach of duty has been sufficient to give rise to the risk of an unfair retrial.

THE RESPONSE OF THE DPP

Mr. Ferriter B.L., on behalf of the Director of Public Prosecutions, contends that the failure to fingerprint the packaging and the vehicle was a failure which existed at the time when the Book of Evidence was first served upon the applicant in February, 1998. He points out that on 23rd March, 1998, the applicant's solicitors sought the results of "*any forensic examinations undertaken"* during the investigation of the case. He says that the applicant and his advisors were conscious of the relevance of such evidence to the applicant's defence.
Although the state of knowledge of the applicant and his advisors has not altered since March of 1998, it is pointed out

that leave to seek judicial review was not sought until 31st July, 2002. This was more than four years after the service of the Book of Evidence, more than two years after the trial of the applicant, and some four and a half months after the decision of the Court of Criminal Appeal.
In response Mr. O'Carroll S.C. says that the judgment of the Supreme Court in *Braddish v. Director of Public Prosecutions* [2001] 3 I.R. 127, which was delivered on the 18th May, 2001, represented a renewed declaration of the principles applicable to the preservation of evidence in criminal cases. He points out that in these proceedings leave was sought within a comparatively short period after the Court of Criminal Appeal had delivered its judgment in these proceedings. He says that the application was undertaken with sufficient promptitude in all of the circumstances.
He points out further that no case has been made on behalf of the respondents in the Statement of Opposition alleging delay or waiver on the part of the applicant. He argues that the respondents may not now make a case which has not been pleaded in the proceedings.

DECISION
In *Braddish v. Director of Public Prosecutions* [2001] 3 I.R. 127 at page 135 the Supreme Court (Hardiman J.) observed *inter alia* that:

> *"It must be recalled that, in the words of Lynch J. in Murphy v. Director of Public Prosecutions [1989] I.L.R.M. 71, the duty to preserve evidence is to do so 'so far as is necessary and practicable'. A duty so qualified cannot be precisely or exhaustively defined in words of general application. Certainly, it cannot be interpreted as requiring the gardaí to engage in disproportionate commitment of man power or resources in an exhaustive search for every conceivable kind of evidence. The duty must be interpreted realistically on the facts of each case."*

In *B. v. Director of Public Prosecutions* [1997] 3 I.R. 140 the Supreme Court Denham J. declared (at p. 196) that:

> *"The community's right to have offences prosecuted is not absolute but is to be exercised constitutionally, with due process. If there is a real risk that the applicant would not receive a fair trial then, on the balance of these constitutional rights, the applicant's right would prevail…".*

A citizen, charged with the commission of a criminal offence, has a constitutionally protected right to a trial *"in due course of law".*
The courts have repeatedly asserted that this right will be violated if the accused person is exposed to a real and serious risk that he or she will not receive a fair trial.
If such a risk can be proved by way of evidence and on the balance of probabilities then a trial must be prohibited. That is an overriding principle which applies to all criminal trials. It applies to the proposed retrial which is the subject of these proceedings.
Mr. O'Carroll S.C. contends that the failure of the Gardaí in this case to obtain and preserve fingerprints and palm marks from the applicant's motorcar and the outer packaging surfaces of parcels has exposed the applicant to a real and serious risk of an unfair retrial.
I cannot accept that contention. I do not believe that fingerprints or palm marks from the steering wheel or dashboard or any other part of the applicant's motorcar could have had any relevance to the applicant's retrial or to any case sought to be advanced on his behalf.
It is acknowledged that the BMW vehicle found by the Gardaí near Long Meadows Park on the date when the offences are alleged to have been committed was the applicant's vehicle. It is accepted that, prior to the date of the commission of the alleged offences, he had used the vehicle, in the ordinary way, for a social, domestic, recreational and business purposes on a regular basis.
In such circumstances, the presence of the applicant's fingerprints and palm marks all over the vehicle was to be expected and indeed their absence would have been remarkable.
No cogent argument has been advanced indicating how the presence or absence of such fingerprints or palm marks on the vehicle could be in any way relevant to the issues to be determined at the retrial. It follows that the applicant has failed to demonstrate, on the evidence, that the absence of such evidence has exposed him to the risk of unfair trial.
No other argument has been advanced indicating why the applicant's retrial should be prohibited by reason of the failure of the Gardaí to obtain and preserve fingerprints and palm marks from the applicant's motorcar. Accordingly I am not satisfied that the trial should be prohibited on that ground.
It is claimed on behalf of the applicant that his retrial should be prohibited because the Gardaí failed to obtain and preserve fingerprints and palm marks from the outer packaging surfaces of the parcels of cannabis resin which were recovered at or near the location where the offences were alleged to have occurred.
In fact, the surfaces of the parcels were forensically examined on behalf of the prosecution. Evidence of the results of that forensic examination was adduced during the applicant's trial. The results of the examination were that no fingerprints or palm marks were found upon the packaging services of the parcels.
It is contended on behalf of the applicant that, if a forensic examination had been conducted earlier, fingerprints or palm marks might have been discovered which might have linked the parcels with a person or persons other than the applicant.
During the applicant's trial, Francis O'Reilly testified on behalf of the applicant. He admitted to the possession of the cannabis and said that he intended to supply it to persons other than the applicant. He said that he placed the parcels where they were found and that he buried the further parcels in the location where they were discovered by the

Gardaí. He remains available to adduce the same evidence at the applicant's retrial.
It is contended on behalf of the applicant that, if the outer packaging surfaces of the parcels had been forensically tested earlier, they might have disclosed the presence of fingerprints or palm marks relevant to the issues to be determined at the trial. That contention is of course speculative in nature but such evidence could only have comprised either:
(a) Mr. O'Reilly's fingerprints or palm marks and/or,
(b) the fingerprints or palm marks of some other person or persons or,
(c) the applicant's fingerprints or palm marks.
Having regard to the total absence of any fingerprint or palm mark evidence linking the applicant to the parcels and to Francis O'Reilly's evidence admitting possession of the parcels, it is difficult to understand how the applicant will be disadvantaged by the absence of evidence of the results of earlier forensic tests. Such evidence could serve no purpose other than to confirm something which is not in issue at the retrial, that is that no fingerprint or palm mark evidence is available and can be relied upon by the State which links the applicant to the cannabis resin which forms the basis of the charges preferred against him.
It is not without significance that the absence of such evidence was relied upon on behalf of the applicant during the course of his trial in July of 2000. It was also relied upon on behalf of the applicant during his appeal to the Court of Criminal Appeal in March of 2002.
Delivering its judgment in the appeal, the Court of Criminal Appeal, which had heard and considered in detail all of the evidence adduced during the applicant's trial, referred expressly to:

> *"...the fact that although the Gardaí had seen the two bricks or blocks of cannabis being thrown away and they were wrapped in plastic, no fingerprint evidence was obtained or certainly no attempt was made to obtain it early enough to ensure that such evidence would be available"*
> It continued:
> " *The court does not think it desirable there should be any comment on that matter because the court has decided that, while the conviction should be set aside on counts 3 and 4 there should be a new trial...".*

It follows that the Court of Criminal Appeal, having considered all of the evidence adduced in the applicants trial and all of the circumstances surrounding the case including the fact that *"no fingerprint evidence was obtained or certainly no attempt was made to obtain early enough to ensure that such evidence would be available ..."*, did not consider that this factor gave rise to a risk that the applicant would not received a fair retrial in the circumstances.
It may well be that it was not argued before the Court of Criminal Appeal on behalf of the applicant that the absence of fingerprint or handprint evidence of this kind would expose the applicant to a risk of an unfair retrial.
However, the Court, on that occasion, considered that a retrial was appropriate in the circumstances. The applicant's advisors did not argue to the contrary.
I think they were correct not to do so because I do not believe that the absence of any evidence of the results of earlier fingerprint and palm mark testing will or could result in any possible prejudice to the applicant's capacity to defend himself in respect of the charges preferred against him. I do not accept that the absence of that evidence will in any respect expose him to the risk of an unfair retrial.
It follows that I am not satisfied that the retrial of the applicant should be prohibited on the ground that the Gardaí failed to obtain and preserve fingerprints and palm marks from the outer packaging surfaces of the parcels of cannabis resin which were recovered at or near the location where the offences are alleged to have occurred.
In the light of the foregoing, it is unnecessary for me to consider the submissions made on behalf of the respondents relative to the alleged delay on the part of the applicant in seeking the relief which has been sought herein.
I should point out in passing that the duty which rests upon the prosecuting authorities to preserve evidence and to do so *"as far as is necessary and practicable"* is a duty which has been identified repeatedly by the courts before and after the decision of the High Court (Lynch J.) in *Murphy v. Director of Public Prosecutions* [1989] I.L.R.M. 71.
It is noteworthy in the instant case that the applicant's solicitors sought the results of "*any forensic examinations undertaken"* from the State on the 28th March, 1998. The Book of Evidence in the case was delivered to the applicant on 6th February, 1998.
The applicant claimed at his trial that when he read the Book of Evidence in February of 1998 he *"...wanted fingerprint evidence ..."* If that was so then, in February 1998, the applicant and his advisors considered such evidence to be relevant to the issues to be determined at his trial.
However, no step was taken on behalf of the applicant to seek the relief which has been sought in these proceedings until 12th August, 2002.
As I have indicated, however, it is unnecessary for me to consider that aspect of the case since I am not satisfied on the evidence that the applicant has proved that he is entitled to the relief which has been sought.
Accordingly the relief sought is refused.