Neutral Citation: [2014] IEHC 158

THE HIGH COURT

[2013 No.440 JR]

BETWEEN

GARY DONNELLAN

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Birmingham delivered the 28th day of March 2014.

1. This is a lost evidence case which sees the applicant seek to prohibit his trial in the Dublin Circuit Court on the three charges that he faces, namely that on the 25th September, 2011, he had in his possession at Monksfield Grove, Clondalkin, a Heineken glass bottle with a hydrocarbon fire accelerant (namely paraffin) in the bottle and tissue paper in the neck of the bottle:

> (i) In such circumstances as to give rise to a reasonable inference that he had not got it in his possession for a lawful purpose, contrary to s. 27A(1) of the Firearms Act 1964, as substituted by s. 59 of the Criminal Justice Act 2006, as amended by s. 38 of the Criminal Justice Act 2007.
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> (ii) In circumstances where he intended to cause injury to, incapacitate or intimidate any person, either in a particular eventuality or otherwise contrary to s. 9(5) of the Firearms and Offensive Weapons Act 1990.
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> (iii) In circumstances where he intended without lawful excuse to use it or to cause or permit another to use it to damage property belonging to some other person in a way which he knew would be likely to endanger the life of a person other than the possessor, contrary to s. 4 of the Criminal Damage Act, 1991.

2. The factual background to the present proceedings is that on the 25th September, 2011, the gardaí were called upon to attend the scene of what has been described as a noisy party at 74 Monksfield Grove, Clondalkin, Dublin 22, which was the home of the applicant's girlfriend. The relevance of this is that it brought Garda Geraldine Angelia Browne, who attended there into contact with the applicant who was present at the party and was told by the gardaí to go indoors.

3. According to Garda Brown, between 30 and 35 minutes later she was patrolling the Monksfield area of Clondalkin along with a colleague, when she saw two males acting suspiciously. One of these she recognised as Gary Donnellan whom she noted was wearing the same clothes as he had been earlier at the party. The other male she did not know. Both ran off in the direction of Knockmitten Park. Garda Kennedy brought the patrol car alongside the applicant. She saw that Mr. Donnellan had a Heineken green bottle in his hand with white paper coming out the top and she saw him throw the green bottle and also a green balaclava into the driveway of 5 Monksfield Grove. The other male threw a plastic bottle and white towel into 3 Monksfield Grove. All these items were picked up by her colleague Garda Cleary. Garda Brown states that there was a strong smell of petrol coming from the bottles and that there was still some liquid in the bottles. A similar comment is made by Garda Cleary.

4. On the 25th September, 2011, Garda Brown arrested Mr. Donnellan on suspicion that he was in possession of an explosive device at Monksfield Grove, Clondalkin. Following his arrest he was brought to Clondalkin garda station where he was detained.

5. The bottles located at the scene, the Heineken bottle and the plastic Mountain Clear sparkling water bottle were brought to the Forensic Science Laboratory. Dr. Aine Whelan of that laboratory has provided a statement for inclusion in the book of evidence indicating that the items in question were examined for hydrocarbon fire accelerants eg. petrol, white spirit, paraffin oil, or diesel oil. Partly evaporated paraffin oil vapour was detected in both bottles.

6. It is of relevance that in the course of his detention the applicant was interviewed on a number of occasions when many questions in relation to the bottle and, also, the balaclava were put to him. To all questions his response was "no comment", this included occasions when ss. 28, 29 and 30 of the Criminal Justice Act 2007, were invoked.

7. The sequence of events which occurred here is of some significance and requires consideration. As I have mentioned, the applicant was arrested and detained on the 4th October, 2011, not quite a year later on the 11th August, 2012, he was charged and returned for trial on the 18th October, 2012. On the 16th April, 2012,, the items which were examined by the Forensic Science Laboratory were returned to the gardaí. Since then they have been lost or mislaid and as a result are now unavailable. They will not be produced at trial, notwithstanding that they are listed as exhibits in the book of evidence and are not available now for any forensic examination that the defence might require.

8. On the 28th January, 2013, and again on the 1st March, 2013, the applicant attended his solicitor, Ms. Jean Tomkin. According to Ms. Tomkin, he instructed her that the bottle, to the best of his knowledge, did not contain paraffin, but rather diesel which he had obtained from the family home. In these circumstances, on the 11th April, 2013, contact was made with a practice offering an independent forensic science service in Britain. On the 23rd April, 2013, a request was made to the second named respondent seeking facilities for an inspection by a forensic scientist engaged by the defence. The trial had at this stage been listed to proceed on the 5th June, 2013. However, on the 30th May, 2013, the D.P.P. informed the defence that the exhibits were missing and could not at present be located.

9. On the 24th June, 2013, leave to seek judicial review was sought and obtained from this Court. In the course of the grounding affidavit, the applicant avers as follows:

> "I had the bottle in my possession because I had gone to my home at 21 Woodford View, to obtain diesel for my

girlfriend's car which at that time was located at her home as above and was out of fuel. My father is a truck driver and keeps diesel in a shed at our home. Ms. Callaghan had proposed to drive to a nearby 24 hour filling station to obtain cigarettes and food, but her car was empty of fuel. I did put some diesel into the bottle and was on the way back to 74 Monksfield Grove, when observed by members of An Garda Síochána. The individual who was with me was assisting towards the same purpose. I left the area when observed because of my earlier encounter with the gardaí. I therefore say and believe that the bottle contained diesel and not paraffin."

10. I began this judgment by commenting that this is a lost evidence case, notwithstanding that the second named respondent has submitted that this is not a lost evidence case in the real sense of these words at all. As pointed out in Heffernan and Ní Raifeartaigh in *Evidence in Criminal* Trials (2014) the extent of the duty to seek out and preserve evidence has been the subject of a vibrant discourse in the superior courts in the past several years. While the general principle has been recognised for over a century, the considerable volume of contemporary case law is generally traced to the decision in *Braddish v. Director of Public Prosecutions* [2001] 3 I.R. 127. The trickle of cases that had preceded *Braddish* evolved into a steady stream. In the recent past, the courts have tended to emphasise the limits of the duty to preserve evidence and the exceptional nature of injunctive relief. In that context, in *Byrne v. Director of Public Prosecutions* [2010] IESC 54, the Supreme Court made clear that orders prohibiting criminal trials on the basis of missing evidence will be exceptional. O'Donnell J. commented "The position has now been reached where it can be said that other than perhaps the very straightforward type of *Braddish* case, it would now require something exceptional to persuade a court to prohibit a trial. This, he added, was in his view "in accordance with principle". Heffernan and Ní Raifeartaigh go so far as to say that it will only be in truly exceptional circumstances that trial will be halted. The authors have sought to summarise the principles that emerged from the vast number of cases in this area in the following terms:-

> 1. The courts have emphasised repeatedly that the duty does not lend itself to a precise, exhaustive definition and that it must be interpreted realistically on the facts of each individual case.
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> 2. The prosecution is obliged to disclose to the defence all relevant evidence within its possession. It follows that evidence relevant to guilt or innocence must be kept until the conclusion of the trial insofar as this is reasonably practical. Relevant evidence for this purpose includes evidence which my indirectly assist the accused by providing a lead to other information that might undermine the prosecution case or support the defence case.
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> 3. Exceptionally the obligation resting on the gardaí may go beyond simply retaining and preserving evidence and extend to seeking out evidence that my assist the defence. However, the courts have not laid any general obligation on the gardaí to seek out and take possession of evidence
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> 4. Expectations as to what is reasonably required of the gardaí are tempered by considerations of necessity and practicality in contemporary policing. Thus the duty must be interpreted in a "fair and reasonable manner" and cannot be construed as requiring the gardaí to engage in a "disproportionate commitment of manpower and resources in an exhaustive search for every conceivable kind of evidence".
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> 5. There is an onus on the defence to act promptly in requesting material considered to be relevant. At the same time, the gardaí and the prosecution must act reasonably in ensuring that information and material is disclosed to the defence in a timely fashion.
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> 6. The onus of proof on an accused who seeks an order prohibiting his trial is to establish a real risk that he cannot obtain a fair trial. This means an unfairness which cannot be avoided by appropriate rulings and directions on the part of the trial judge. The prohibition of a trial must be based on more than a remote, theoretical or fanciful possibility. The exercise of the courts jurisdiction must be careful and realistic.
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> 7. The focus of the court's inquiry should be the fairness of the eventual trial in the absence of the missing evidence. Neither the shortcomings in the investigative process nor the question of fault should concern the court (except insofar as they impact on the prospects of a fair trial).
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> 8. The applicant must engage with the facts of the case in order to demonstrate the relevance and significance of the missing evidence. The impact of this missing evidence must be considered in the context of all the evidence likely to be put forward at trial. It will depend in part on the prosecution's case and proposed evidence and the extent to which the evidence might have assisted the defence in presenting an alternative theory to that presented by the prosecution. The availability to the defence of alternative evidence that can provide a viable substitute for the lost evidence will undermine an application for relief.

11. Of the great number of cases that have come before the courts in recent years, the case that seems closest to the facts of the present case is probably the case of *McFarlane v. Director of Public Prosecutions* [2007] 1 I.R. 134. This was the case where the applicant was facing trial on offences relating to the false imprisonment of businessman, Don Tidey. By the time that the trial was about to come on, many years after the crime occurred, a number of exhibits were missing. The missing exhibits were a milk carton, a plastic container, and a cooking pot alleged to have been found at the place where Mr. Tidey was held, and which it was said bore the applicant's fingerprints. The fingerprints had been photographed *in situ* and these photos of the impressions were available. The items were forensically examined at the time and the results of that exercise had been preserved. The applicant argued that as a result of the loss of the items, he was not in a position to evaluate the physical evidence with the assistance of an independent expert retained by him. Those arguments carried the day in the High Court, but the Supreme Court concluded that as there had been a forensic examination of the missing items prior to their disappearance and the results of the analysis had been preserved, the applicant was not deprived of the reasonable possibility of rebutting the evidence preferred against him and he had not discharged the onus of proof that there was a real risk that he could not obtain a fair trial. Hardiman J. made the point that while the gardaí were in breach of their duty to preserve the evidence, that breach had not resulted in the loss of the evidence in an independent verifiable form. This is a reference to the photographs. Hardiman J., with whom Murray C.J. and Geoghegan and Fennelly J.J. concurred, stressed that when the case proceeded to trial, different considerations might apply. The powers of the trial judge were wholly unaffected by the outcome of the judicial review application.

12. In my view the applicant's engagement with the facts in this case has been incomplete and unsatisfactory. He does not address at all the fact that from the time of his arrest, detention and questioning, he was fully aware of the fact that the gardaí were seeking to make the case against him that he was in possession of paraffin oil, in effect a petrol bomb, or so called Molotov cocktail. He makes no mention of what, if anything, he has to say about the green balaclava, and he is entirely silent about the circumstances in which a bottle containing an inflammable liquid and tissue paper was thrown into a driveway at the same time as his companion did the same thing with the plastic bottle which was thrown into an adjoining driveway.

13. I do not believe that the applicant has discharged the onus of proof on him to establish that there is a real and substantial risk of an unfair trial. On the contrary, at this stage it seems to me that it is very likely indeed that a fair trial will result. If the trial was to be halted at this stage, that could only be because of a desire to discipline or punish the gardaí for losing the evidence. That is not the purpose of the court. However, in that regard, it hardly needs be said that exhibits ought not to be lost and that the loss of exhibits is a serious matter.

14. I have said and I am firmly of the view, that at this stage, the risk of an unfair trial has not been made out. However, just as the Supreme Court did in *McFarlane*, I would stress that if the case proceeds to trial, it is possible that different considerations will apply at that stage. The fact that the applicant had been unsuccessful in these judicial review proceedings, in no way detracts from the power and duty of the court of trial to assess the case as it develops.

15. I would echo the words of the Supreme Court that the trial court will be able to assess the evidence as it develops, whether there is any unfairness to the evidence incapable of remedy by the trial court, which has responsibility.

16. In the context of the present case, at trial, the evidence of Dr. Whelan will be of particular significance. In that context, I note that the defence has obtained sanction to commission an independent forensic report. While the scientist engaged will not be able to analyse whatever liquid which had not evaporated and was in the bottle, as he/she might have wished to do, the scientist will be able to review, comment and if necessary criticise the results of the tests carried out by Dr. Whelan. No doubt the experts on both sides, if that stage is reached, will have views on how likely or otherwise it is that diesel would be mistaken for paraffin. Equally, they may have comments to make on the fact that Garda Brown, Garda Keith Cleary, her companion on the night in question, and also Garda. Dylan Jordan, the fingerprints examiner all refer to the presence of a strong smell of petrol. However, all of that is or may be for the future. For the present the position is that the applicant has failed to establish that there is a real risk of an unfair trial and for that reason I must refuse him the relief that he seeks.