

**THE HIGH COURT****2008 502 JR****BETWEEN:****NERIJUS BALTUTIS****APPLICANT****AND****HIS HONOUR JUDGE MICHAEL O'SHEA and THE DIRECTOR OF PUBLIC PROSECUTIONS and THE COMMISSIONER OF AN GARDA SÍOCHÁNA****RESPONDENTS****Judgment of Mr. Justice Hedigan, delivered on the 19th day of August, 2009**

1. The applicant is a Lithuanian national who is currently facing a charge of robbery contrary to section 14 of the Criminal Justice (Theft and Fraud Offences) Act 2004 ('the 2004 Act') before the Circuit Criminal Court.
2. The first named respondent is a Judge of the Circuit Court, sitting at Dundalk in the County of Louth.
3. The second named respondent is the authority responsible for the prosecution of criminal offences in Ireland. His statutory authority to carry out this function is derived from the Prosecution of Offences Act 1974.
4. The third named respondent is the senior official within An Garda Síochána. He retains oversight over all the activities of the force.
5. The applicant seeks the following relief by way of judicial review:-
  - (a) An order of prohibition or, in the alternative, an injunction restraining the second the named respondent from taking further steps to prosecute him in respect of the charge of robbery; and
  - (b) A declaration that An Garda Síochána have failed in their duty to seek out and preserve evidence that bears on the guilt or innocence of the applicant and in particular which would have tended to support the claim of innocence made by him.

**I. Factual and Procedural Background**

6. The applicant was summoned to appear before Drogheda District Court on the 18th of May 2007 on a charge of robbery contrary to section 14 of the 2001 Act. On the 22nd of June 2007, District Judge Brennan declined to accept jurisdiction and adjourned the matter for the service of a book of evidence. On the 27th of July 2007, the applicant was served with the book of evidence and sent forward for trial to the next sittings of the Circuit Criminal Court in Dundalk. The applicant's co-accused failed to appear on the 27th of July 2007 and a warrant was issued for his arrest.
7. The case contained within the book of evidence was that the applicant, together with his co-accused, did at approximately 3.15am on the 19th of March 2006 at Beamore Road in Drogheda rob one Graham Carroll. The particulars of the offence are that the applicant and his co-accused followed the alleged victim; attacked him by striking his head and kicking him; and stole his wallet containing an identification card, a bank card and €30 in cash.
8. The alleged victim did not provide any substantive identification of the assailants, save that they were two males. Rather, the main identification evidence in the case comes from two members of An Garda Síochána, both of whom were off-duty at the time they witnessed the incident. The first of these, Garda James McCormack, was living opposite the scene of the robbery and describes how he looked out the window of his home to witness two males kicking and punching a man who was lying on the ground. Garda McCormack also provides a general description of the assailants. The second off-duty member was Garda Aidan Maguire, who states that he was travelling in his motorcar when he observed two men running away from a third man, who was lying on his back on the ground. Garda Maguire details how he followed the two assailants, travelling slowly in his car behind them. He maintains that he kept the assailants in his sight at all times and contacted Drogheda Garda Station and asked them to send assistance. Garda Maguire also gives further details of his journey and explains that eventually, he spotted his Garda colleagues approach the two assailants in a patrol car and stop them. He then recalls drawing near to his colleagues and identifying the two men as the same ones he had seen running from the scene of the robbery. It should be noted that there are some discrepancies between the accounts given by Garda McCormack and Garda Maguire. For example, Garda McCormack describes the robbery as having taken place at approximately 3.30am whereas Garda Maguire recalls spotting the two men running from the scene at around 4.00am.
9. One of the Gardaí in the patrol car was Garda Austin Kelly. His evidence is that he was sent by Drogheda Garda Station in response to the call of Garda Maguire. He drove towards the scene of the robbery and noticed two men of foreign nationality walking in the opposite direction. He states that he drew close to them in the squad car and confronted them. At the same time, he recalls that Garda Maguire made himself known to him and identified the two men as those who had carried out the robbery.
10. It is not in dispute that the two men who were spoken to by Garda Kelly were the applicant and his co-accused. It is also common case that neither of the men was arrested at the time nor asked to make a statement. However, there is considerable disparity between the account given by the applicant of what occurred during the course of the encounter, and that given by Garda Kelly. The applicant maintains that he and his co-accused were stopped by Garda Kelly and another female Garda. He contends that they were then searched by the female Garda and that two mobile phones and a driver's licence were removed from his pocket. The mobile phones were then returned to him and the two men were permitted to continue on their way. The applicant suggests that this exchange was followed by a second encounter, during which he and his co-accused were again searched by the female Garda. On this occasion, the two mobile phones were retained by the Garda as well as some loose change which the applicant had been carrying. On Garda Kelly's version of events, only one such encounter took place. Garda Kelly states that although another female

Garda was present, she took no part in the search which he attests he carried out personally.

11. When the applicant and his co-accused arrived home, the applicant asserts that they spoke with another housemate of theirs, who had a superior command of the English language. They promptly went to Drogheda Garda station with their housemate and sought to speak with Garda Kelly in relation to the events which had taken place earlier in the evening. When Garda Kelly agreed to speak to the applicant and his co-accused, the applicant requested the return of the two mobile phones which had been taken from him. These were duly given to him while his driver's licence was retained. Garda Kelly explained to the applicant that he did not wish to take any statements at that time. The explanation which he now provides for such a decision is that he had yet to fully interview the alleged victim at that point, and was therefore not in a position to question any suspects. Again, some conflict arises on the evidence at this point. The applicant maintains that Garda Kelly indicated that the applicant ought to return at a later date to make a statement in relation to the offence and that, on foot of this recommendation, he returned on three subsequent occasions but was unable to speak to Garda Kelly each time. He claims that he left at the Garda station the telephone number of a male friend with good spoken English, with a view to scheduling meeting with Garda Kelly. Garda Kelly, by contrast, denies any knowledge of such an arrangement.

12. On the 7th of September 2006, the applicant's co-accused was contacted and interviewed in relation to the alleged offence. A memorandum of this interview records that the applicant's co-accused informed Garda Kelly that neither he nor the applicant had been involved in the robbery. The applicant's co-accused further stated that at the time when he and the applicant were approached by the Gardaí, they were on their way home from a nightclub called 'Storm' and they had not travelled past the scene of the alleged offence during the course of their journey. Their only stop, according to him, was to get some food at an 'Abrakebabra' fast food restaurant. It should be noted that this account of events is now supported by the applicant who maintains that this interview with his co-accused was the first time any contact had been attempted by the Gardaí. Garda Kelly rejects this suggestion however, and asserts that in fact he made numerous attempts to contact the applicant and his co-accused at the address which they had provided. Specifically, he avers that he called to the house on numerous instances and, since the house was unoccupied on each occasion, he left Garda calling cards, with a request that the occupants should contact him.

13. The applicant thus maintains that he was completely unaware of the possibility of any criminal proceedings until he received the summons requiring him to appear at Drogheda District Court on the 18th of May 2007. In any event, he was sent forward for trial on indictment on the 27th of July 2007 and on the 18th of September 2007, the applicant's solicitor contacted the relevant State Solicitor making a request for disclosure of evidence in the case. In particular, the applicant's solicitor sought clarification as to whether any video evidence had been sought and obtained showing the movements of the applicant and his co-accused on the night of the alleged offence. The applicant's solicitor also inquired as to whether Garda Kelly had acted on the assertions made by the applicant's co-accused during the course of his interview, by seeking CCTV footage from 'Storm' nightclub and/or 'Abrakebabra'.

14. On the 25th of September 2007, the State Solicitor replied with a letter containing two brief additional witness statements from the alleged victim and Garda Kelly. The State Solicitor also indicated that he was under the impression that disclosure had already been made by the Gardaí. On the 26th of September 2007, the applicant's solicitors replied indicating that this was not the case but thanking the State Solicitor for the provision of the supplementary statements.

15. On the 28th of September 2007, the applicant's solicitor received direct correspondence from Drogheda Garda station, containing copies of all witness statements in the case. In addition, it was made clear that the video of the interview of the applicant's co-accused could be made available on request. It was further clarified that no other video evidence had been used in the investigation and that none had been sought or obtained from 'Storm' nightclub or 'Abrakebabra' restaurant. In the opinion of the investigating Gardaí, such evidence was immaterial as the alleged robbery had occurred some distance away and a witness had place the applicant at the scene.

16. On the 5th of October 2007, the applicant's solicitor wrote to the Superintendent of An Garda Síochána at Drogheda Garda station alleging that the investigation of the alleged robbery had been deficient owing to the failure to seek out video evidence from 'Storm' nightclub or 'Abrakebabra' restaurant, in addition to the failure to interview the applicant at any stage during the investigation. The letter went on to call on the Superintendent to seek directions from the second named respondent that the prosecution should be withdrawn.

17. The applicant's solicitor went to considerable efforts in the weeks following this tranche of correspondence to contact the managers of 'Storm' nightclub and 'Abrakebabra' restaurant. The manager of 'Storm' informed him that video footage of all patrons entering and leaving the nightclub would have been available for one month after the incident. The manager of 'Abrakebabra', meanwhile, confirmed that video footage of all patrons entering and leaving the restaurant would have been available for up to six months after the incident. Both managers confirmed that they had, on other occasions, supplied similar video footage to the Gardaí.

18. On the 23rd and 24th of January 2008, an application was made to the first named respondent seeking a direction that the prosecution should be halted. During the course of this hearing, the first named respondent expressed doubt as to whether he had jurisdiction to hear such an application in advance of trial. Following receipt of detailed legal submissions and a number of adjournments, the first named respondent ultimately decided on the 24th of April 2008 that the matter ought to either be dealt with during the course of trial or else made the subject of judicial review before this Court.

19. On the 28th of April 2008, leave to apply by way of judicial review was sought from the High Court. This was granted by Peart J. on the same day.

## **II. The Submissions of the Parties**

20. The applicant's case is a straightforward one. He argues that the failure of the Gardaí to seek out and preserve the video footage from 'Storm' nightclub and 'Abrakebabra' restaurant amounts to a dereliction of their investigative duty. In his submission, there is a strong possibility that exculpatory evidence could have been obtained from such sources, in the absence of which his right to a fair trial will be irreparably prejudiced. In the absence of such evidence, the applicant contends that there are no effective means by which he could contradict the identification evidence of Garda Maguire.

21. The second named respondent asserts that no prejudice could conceivably arise by virtue of the failure of the Gardaí to seek out and preserve the video evidence in the present case. He argues that any evidence, which could theoretically have been obtained from the sources suggested, would have been immaterial to the issues of fact which will arise at trial. On this basis, he submits that the applicant's case is without foundation.

## **III. The Decision of the Court**

22. This case is not a novel one. With increasing frequency, the High Court is being asked, through the medium of applications for

judicial review, to intervene in the criminal sphere on the basis of an alleged failure on the part of the prosecuting authorities to preserve relevant evidence. The principles applicable to such cases are well-established. The fundamental premise of the jurisprudence affirms that it is the duty of the prosecution authorities, in particular An Garda Síochána, to seek out and retain evidence which is capable of having a bearing on the guilt or innocence of the accused. This primary requirement is the starting point for applications such as that in the instant case and is an essential aspect of the right to a trial in due course of law, as guaranteed by Article 38.1 of Bunreacht na hÉireann.

23. However, the obligation to preserve evidence, like all legal principles of a general nature, is not without exception. In the recent decision of *Kearney v. DPP* (High Court, unreported, 15th July 2009), this Court made the following observations:-

"The obligation to seek out and preserve is [...] subject to a number of clear caveats. The first of these is that the missing evidence in question must be such as to give rise to a real possibility that, in its absence, the accused will be unable to advance a point material to his defence. The mere disposal of items of evidence, which do not possess any, or any sufficient, nexus with the case that the accused seeks to make, will not amount to a breach of duty by the Gardaí. In *Dunne v. DPP* [2002] 3 IR 305, Hardiman J. stated at page 323:-

'The emphasis [...] on the need for the obligation to seek out, and indeed to preserve, evidence to be *reasonably* interpreted requires, I hope, that no remote, theoretical or fanciful possibility will lead to the prohibition of a trial.'  
(Emphasis in original)

The second reservation, which must be added to the general duty, is that the Gardaí must only do what is reasonably practicable in seeking to identify and preserve pieces of material evidence. This much is clear from the decision of the Supreme Court in *Braddish v. DPP* [2001] 3 IR 127. In that case, Hardiman J. considered the ambit of the duty and made the following instructive remarks:-

'It must be recalled that, in the words of Lynch J., in *Murphy v. Director of Public Prosecutions* [1989] ILRM 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 manpower or resources in an exhaustive search for every conceivable kind of evidence. The duty must be interpreted realistically on the facts of each case.'

The final applicable caveat is that cases such as this one must be determined in light of their own particular circumstances. It is necessary for the Court to determine what level of intervention is required to protect due process in light of the specific facts. This much is clear from the decision of Hardiman J. in *Braddish*, cited above, and also from the decision of the same judge in *Ludlow v. DPP* [2008] IESC 54."

24. In addition to these limitations on the scope of the duty itself, there are also a number of positive obligations which rest on applicants who seek orders of prohibition on the basis of missing evidence. In *Savage v. DPP* [2008] IESC 39, Fennelly J. stated the following:-

"The applicant must show, by reference to the case to be made by the prosecution, in effect the book of evidence, how the allegedly missing evidence will affect the fairness of his trial. Hardiman J said in *McFarlane v. DPP* [2007] 1 IR 134 at page 144 that:

'In order to demonstrate that risk 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.'

Whether the applicant, through his solicitor or otherwise makes a timely request of the prosecution for access to or an opportunity to have the articles at issue expertly examined may be highly material. In *Bowes v. DPP* [2003] 2 IR 25, the "very belated" request was critical to the refusal of relief. On the other hand, in *Dunne* [2002] 3 IR 205, no request was made until some five months after charge, and long after there was any possibility of producing the video tape. In that case, however, Hardiman J stated (at page 325):

'There is.....a responsibility on a defendant's advisers, with their special knowledge and information, to request material thought by them to be relevant.'

However, a suspect or an accused person will be unable to make a timely request, if the Gardaí have destroyed or parted with possession of the material. Thus, they must give consideration to the likely interests of the defence before making such decisions."

25. Applying these principles to the present case, I am willing to accept that the evidence which the applicant contends ought to have been obtained, although somewhat speculative, is not so tangential as to merit condemnation as being "theoretical or fanciful" in the manner envisaged by Hardiman J. in *Dunne*. In appropriate circumstances, such video footage might be of critical importance to a robbery charge such as that at issue. I am also satisfied that, in such a case, it would be quite reasonable to expect the Gardaí to pursue such evidence. The effort required in retrieving such video footage would not amount to a disproportionate commitment of manpower or resources on their part. Indeed, there was evidence before the Court to the effect that this amounts to a regular practice of the Gardaí in respect of both 'Storm' nightclub and 'Abrakebabra' restaurant.

26. Turning however to the specific obligations which rest on the applicant in a case such as this, I am not convinced that he has engaged to a sufficient degree with the evidence tendered by the second named respondent. The applicant does not dispute that he and his co-accused were stopped by Garda Kelly a short distance away from the scene of the alleged robbery on the night in question. Furthermore, it is the clear and unambiguous evidence of Garda Maguire that the two men stopped by Garda Kelly were the same two whom he witnessed fleeing from the scene of the crime a short time prior to this, and that they never left his sight during the interim. In addition to this, Garda McCormack gives detailed evidence of having witnessed the offence taking place across the street from his own home. While there is a slight incongruence between the times given by Garda McCormack and Garda Maguire, this is quite probably explained by the fact that neither Garda was on duty at the time and, in any event, is not of such gravity as to undermine the prosecution case. The crucial thrust of the evidence is the visual identification of the applicant by multiple witnesses, including the uninterrupted pursuit of the two men by Garda Maguire leading to a point at which the applicant, on his own evidence, accepts that he was stopped. Issues as to the precise timing of events can only be construed as secondary to this. In these

circumstances, it is difficult to conceive how the absence of evidence which only potentially shows the applicant entering or leaving particular premises at a particular time could warrant an order of prohibition.

27. I am supported in my conclusions by the failure of the applicant to make efforts to obtain the video footage for a considerable period after he became aware of the charges against him. On the evidence, it is clear that the first inquiry in this regard was not made until more than 4 months after the applicant became aware of the charge against him, and 2 months following his being sent forward for trial. It is equally apparent that the applicant's solicitor's own independent efforts to obtain the footage did not occur until some time after this. This delay, while an insufficient basis of itself to refuse the relief sought, is nonetheless a factor to be weighed in the exercise of the Court's discretion as to the exceptional remedy of prohibition. I will refuse the relief sought.