

THE HIGH COURT

[2004] No. 393 JR

BETWEEN

ALAN MORGAN

APPLICANT

AND
 THE DIRECTOR OF PUBLIC PROSECUTIONS
 AND THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM
 AND THE COMMISSIONER OF AN GARDA SÍOCHÁNA

RESPONDENTS

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

1. On the 10th May, 2004 the applicant was given leave to apply for judicial review for an order prohibiting or restraining the first named respondent from pursuing a prosecution against the applicant on the basis that the respondents had not sought out or preserved video evidence which may have assisted the applicant in defending himself in criminal proceedings. The criminal proceedings arise out of a Bill of Indictment No. LH 90/03 pending before the Louth Circuit Criminal Court. The applicant was charged with various public order offences and assault on members of An Garda Síochána and resisting members of An Garda Síochána acting in the course of their duty. The alleged offences occurred on the 14th January, 2001 at Earl Street, Dundalk, Co. Louth and also at Dundalk Garda Station, Co. Louth.

2. The applicant's claim can be summarised as follows:

3. He seeks to prohibit his trial on the grounds that the gardaí failed to seek out video evidence which might have been available from a camera over a night club namely club 58X. He contends that the cameras over the night club may have covered a large portion of Earl Street and may have established that the gardaí on the night in question used excessive force against the applicant and others at the scene and that this would give him a defence to the charges made against him. There is evidence that a riot developed in Earl Street in the early hours of the 14th January, 2001. There are a considerable number of witness statements from members of An Garda Síochána and civilian witnesses including the applicant and people who were with him. In a statement made to the gardaí the applicant says that he was arrested in Earl Street for being drunk and disorderly. He describes how one guard approached him and said "...he was arresting me for drunk and disorderly. I was just standing there when two more guards came over. The three of them started hitting me with their fists and batons for no reason. Still I did not resist. I don't know if the three of them hit me with their batons. I was hit on the legs, back, chest and head. I fell to the ground. I don't know if I had any lacerations/cuts at that stage. The three of them fired me into the back of the paddy wagon." He then goes on to describe how a garda was kneeling on his back and thumping him with his fist and goes on to allege further assaults by the gardaí at Dundalk Garda Station. The statements made by members of An Garda Síochána paint a rather different picture and suggest that the applicant was involved in a melee in the middle of Earl Street and that he was throwing punches and was bleeding from the head. The garda statements go on to describe how he resisted arrest and assaulted members of the gardaí at the garda station. The applicant apparently made a complaint to the Garda Complaints Board. By letter dated the 14th February, 2001 the applicant's solicitors wrote to the Commissioner of An Garda Síochána complaining, *inter alia*, that he was assaulted at Dundalk Garda Station by two members of An Garda Síochána. The letter did not suggest that there might some CCTV film available which may be of assistance in investigating the matter nor did the letter request that any such material be sought or preserved. On the 6th June, 2001 the applicant's solicitors wrote a letter to the Superintendent of An Garda Síochána in Dundalk with reference to the trial of the applicant. It is of interest to note that the date of the trial is stated in the letter as being the 6th June, 2001 which was the same date as the letter. The letter requests that for the purpose of preparing his defence that certain material be furnished including "Copies of all statements by all witnesses, and all evidential material obtained in the course of investigations...". In a letter of the 26th February, 2004 the solicitors for the first named respondent informed the applicant's solicitors that no video evidence was available in the case. The applicant's solicitor has sworn an affidavit on the 10th May, 2004. Paragraph 9 of the affidavit reads as follows:

"I say and believe that:

(a) Video cameras were in operation at locations which were in a position to make good quality recordings of the relevant events over a substantial area of Earl Street including the vicinity of the Europa Chip Shop;

(b) The owner/operators of at least two of the said video cameras maintained a standard practice of making the recordings available to the gardaí for the investigation of offences committed in Earl Street."

4. In fact this general issue concerning video cameras was narrowed down to the assertion by the applicant that there may have been video footage on CCTV cameras outside the night club known as "58 X" and that these cameras or one of them may have covered a significant portion of the street at the time of the melee giving rise to the arrest of the applicant. He asserts that this could have corroborated his evidence that the gardaí used unnecessary and unlawful force on him. The applicant sought to cross-examine two witnesses on their affidavits sworn in this matter. The first was Mr. Niall Keogh the owner of the night club and the second was Inspector McGuinn. It is clear from the evidence of Mr. Keogh that the two security cameras outside the door of his night club were there for the assistance and safety of the security personnel and the door man. They were intended to be focused on the immediate area outside the door and were not intended to cover the street in general. He said that on many occasions when the staff arrived for work they would find the cameras had been interfered with by third parties who would stand on a ledge and deliberately turn the cameras away from the door. The cameras could be facing in any direction. If this had occurred it was the practice of the staff to turn the cameras back on to their proper position covering the door and they would do this by means of a long handled brush.

5. There is no evidence that either of the cameras were ever focused on Earl Street in general although there was a theoretical possibility that one or other of them could have been if they had been interfered with by a third party. But it was equally likely they could have been facing the wall or facing up to the sky or anywhere else for that matter. The evidence of Inspector McGuinn was not of particular assistance on the issue of the security cameras outside the night club.

6. I have been referred to a number of cases on the issue of the obligation on An Garda Síochána to preserve potentially explanatory evidence. See *Braddish v. DPP* [2001] 3 I.R. 127; *Dunne v. DPP* [2002] 1 I.R. 303; *Bowes and McGrath v. DPP* [2003] 2 I.R. 25; *Murphy v. DPP* [1989] I.L.R.M. 71; *Scully v. DPP* [2005] 1 I.R. 242; *Z v. DPP* [1994] 2 I.L.R.M. 481; *McFarlane v. DPP* (Unreported, Supreme Court, Hardiman J. 7th March, 2006) and *Blood v. DPP* (Unreported, Supreme Court, McGuinness J. 2nd March, 2005).

7. It is established from the authorities outlined above that there is a general duty and responsibility on members of An Garda

Síochána to seek out and preserve evidence which is relevant to the guilt or innocence of an accused but there are limits to this duty. This is a case concerned with the failure to seek out evidence rather than to preserve evidence. It has not been established whether there ever was video evidence which would have shown the melee on Earl Street on the night in which the applicant was arrested. Inspector McGuinn has said on affidavit that the gardaí were never aware of the existence of any video evidence from club 58X which might have been relevant to the prosecution of the offences alleged against the applicant. The letter of the 6th June, 2001 from the applicant's solicitors to the first named respondent did not explicitly refer to video evidence. It required certain matters to be furnished to the applicant's legal team, including "all evidential material obtained in the course of investigations". It is clear from the evidence that no video evidence was ever obtained so it did not come within the ambit of that request. The respondent claims that the applicant first sought to confirm the existence of video evidence in a conversation with prosecution counsel in 2004. No adequate explanation has been given as to why the applicant did not specify that video evidence which might be of assistance was being sought by him so that the guards could seek to investigate whether there was any such evidence even if they were not relying on it.

8. The applicant in this case asserts that because of the absence of video evidence which he believes may have been helpful he cannot get a fair trial. In *Z v. The DPP* [1994] 2 I.L.R.M. 481 Finlay C.J. stated at p. 498:

"This court in the recent case of *D. v. The DPP* 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 grounds that circumstances have occurred which would render it unfair, is that he should establish that there is a real risk that by reason of those circumstances...he could not obtain a fair trial."

9. At page 489 he stated:

"...an onus to establish a real risk of an unfair trial...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."

10. In *Scully v. The DPP* [2005] 1 I.R. 242 Hardiman J. stated:

"In assessing the issue of what is a real risk...it excludes a risk which is merely remote, fanciful or theoretical."

11. The facts of this case establish that there was a theoretical possibility that the cameras outside the night club 58X could have been focused on the street where the applicant was arrested but it is equally likely the cameras or either of them were focused elsewhere. If they were pointing where they were intended to be they would not be facing the street. Some of the offences with which the applicant is charged occurred away from Earl Street and at the Dundalk Garda Station. Video footage of Earl Street would not have been of any assistance with regard to these matters. At the end of the day the video footage could only be relevant to the assertion subsequently made by the applicant that he was the victim of unlawful force perpetrated on him by members of An Garda Síochána. It seems to me that the minimum requirement on the applicant is that he would have to establish something more than a mere theoretical possibility that a security camera outside the night club would have recorded what happened on the street where the applicant was arrested. In my view he has failed to do this. In the particular circumstances of this case I do not believe there was an obligation on members of An Garda Síochána to search for video footage from every camera on the street. They have to take reasonable steps to ensure that relevant evidence is procured. To seek out video film from cameras which were intended to be focused on a doorway of night club on the other side of the street does not seem to me to be something which should reasonably have been required of the Gardaí in this case. The situation might be different if the gardaí were seeking possible witnesses who might have been in the vicinity of Earl Street on the night in question. But their investigation of the criminal charges alleged against the applicant did not require such an exercise. The preliminary correspondence between the applicant's solicitors and the respondents did not specifically raise the issue of footage from security cameras. In that respect the correspondence was somewhat vague and non-specific. If the question of security camera video footage was of such crucial importance I would have expected it to be raised specifically at an earlier date. I think there was unnecessary delay on the part of the applicant in seeking such material.

12. On the more fundamental point as to whether or not the absence of any video footage from the security cameras of the night club raises a real risk that the applicant cannot have a fair trial it seems to me that the applicant has not met the test of establishing that this is the case. The risk seems to me to be "remote, fanciful or theoretical" to quote the words of Hardiman J. in *Scully v. The DPP* rather than a real risk. In my view there is no reason why the applicant should not have a fair trial having regard to the current state of the evidence and assuming (as I must) that the trial judge will act properly and fairly.

13. I refuse the relief sought.