Neutral Citation Number: [2008] IEHC 391

THE HIGH COURT

JUDICIAL REVIEW

2007 1668 JR

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

AND
JUDGE GEOFFREY BROWNE

RESPONDENT

AND
MICHAEL MULLANE

NOTICE PARTY

Judgment of Mr. Justice McMahon delivered on the 9th day of December, 2008

1. The notice party was charged with the following offence:-

> "On the 18th March, 2006 at Lismeegan, Aughamore, Mayo a public road in the said District Court area of Ballyhaunus did drive a mechanically prepared vehicle Registration No. 03RN705 at a speed which exceeded the national road speed limit of 100km per hour applicable to the said road by virtue of section 7 of the Road Traffic Act, 2004.
>
> Contrary to section 47 of the Road Traffic Act, 1961 (as inserted by section 11 of the Road Traffic Act, 2004) and section 102 of the Road Traffic Act, 1961 (as amended by section 23 of the Road Traffic Act, 2002)."

2. The summons was returnable to Ballyhaunus District Court on 15th November, 2006. The matter was adjourned on a couple of occasions and on 25th June, 2007, Mr. O'Dwyer, solicitor for the notice party, wrote to the superintendent requesting 29 separate categories of disclosure. Twelve of the inquiries related to the hand held computer ("the electronic notebook") used by the gardaí and seventeen related to the processing of the fixed charge notice in relation to the handheld computer. Requests were made for disclosure of the operators' manual, copies of the software licence for the computer, copy of the certificate of competency of the operator and the certificate of competency in the training of the instructor, etc. As to the processing of the fixed charge notice similar requests were made in relation to the software used, the manufacturer's guidelines and handbook, the names of non-garda personnel involved in the processing of data, etc. Although some efforts were made by the State Solicitor to negotiate an agreement in respect of some of the items sought, sufficient progress was not made to satisfy Mr. O'Dwyer. He, therefore, brought a notice of motion returnable on 19th September, 2007, seeking an order for disclosure of all the items listed in the letter seeking voluntary discovery, as well as an order for costs under O. 31, r. 1 of the District Court Rules 1997. In his grounding affidavit, Mr. O'Dwyer claims that the items being sought are of particular relevance because, in April 2006, An Garda Síochána without any statutory basis or public consultation introduced a new system for the processing of fixed charge offences (within the meaning of the Road Traffic Act 2006). In his affidavit, he goes on to describe in detail the old system whereby when a motorist was detected as being in contravention of the Act the prosecutor would complete the fixed charge notice by hand at the road side in a notebook. In contrast, according to Mr. O'Dwyer's affidavit in April 2006, a new procedure was introduced:-

> "A new procedure was adopted which was primarily based on Itronix electric handheld computers. The procedure now employed by the gardaí involved the detection by the prosecutor of the motorist of an alleged offence in the same way as it was in the old regime. Thereafter however the prosecutor must now use a hand held computer by the direction of An Garda Síochána. The details of the motorist are inputted by the prosecutor into the handheld computer." (at para. 6 of the grounding affidavit).

3. Mr. O'Dwyer continues in his affidavit to outline the subsequent processing of the complaint and the electronic transfer to the mainframe computer at the Garda Headquarters, Phoenix Park, Dublin. Without the detailed information of the process Mr. O'Dwyer claims that he is at a disadvantage and his client cannot get a fair trial. Mr. O'Dwyer also refers in his affidavit to the fact that voluntary disclosure has been refused and that he believes "that there [is] a concerted effort being made to conceal the information about how the motorist's details are being processed". (*Idem* at para. 12)

4. He further alleges that the procedure is clearly flawed and that this is known by persons in the highest position in An Garda Síochána to be a fact. He claims the prosecutor themselves are giving evidence in ignorance. (*Idem* at para. 15.) He further avers that it is anticipated that there will be further applications seeking voluntary disclosure for all fixed charge offences coming before the courts. Finally, he claims that there is a veil of secrecy over the entire procedures as introduced and now employed by An Garda Síochána.

5. Mr. O'Dwyer also refers to another prosecution, namely *Director of Public Prosecutions v. Oliver Sweene*y (Unreported, District Court, Geoffrey Browne J., 21st February, 2007) where the respondent herein also made a "Gary Doyle Order" on a previous occasion. Subsequently, in that case, the State Solicitor for Sligo applied to have the case struck out. Mr. O'Dwyer claims that that was a "test a case". This is denied in the affidavit sworn by Seamus Hughes for the Director of Public Prosecutions as indeed are many of the statements made by Mr. O'Dwyer in his affidavit. In *Director of Public Prosecutions v. Oliver Sweeney* (Unreported, District Court, Geoffrey Browne J., 21st February, 2007), the State claims that the case was dropped because they could not comply with the disclosure order made (which also related to 29 categories of disclosure in a speeding case) and there was no "relevancy hearing" and no expert evidence called by either the defence or the prosecution. In a third case, it appears that the State Solicitor indicated that disclosure could be made in relation to some of the categories identified, but not all.

6. In his grounding affidavit for the relief sought in these proceedings, Seamus Hughes, State Solicitor for the County of Mayo set out what happened in the District Court on the day the respondent herein made the disclosure requested by Mr. O'Dwyer, the solicitor for the notice party. For reasons that will become obvious at a later stage I set out in full his account hereunder.

> "22. After Mr. O'Dwyer concluded and urged on the court to make the Order for Discovery, the Respondent asked me to address him. I pointed out to the Respondent that I was in Court representing the State to set out the State's attitude towards correspondence received from Mr. O'Dwyer seeking discovery in respect of 29 separate categories. I said I had replied to his correspondence indicating which of those matters the State was in a position to make discovery of and those matters which the State was not in a position to make discovery of. I referred Judge Browne to Eamon Cahill's book on *Discovery in Ireland* pp. 74-75, I pointed out that the discovery in this case related to Fixed Penalty Offences of which

there are approximately 50, such as speeding, failure to wear seatbelts and similar type summary offences. I said to the best of my knowledge none of the 50 offences was the hybrid type which could be tried both summarily and/or on indictment but they could only be tried summarily. In the main they were minor road traffic offences in the overall regime of road traffic offences.

23. I pointed out that it was a matter for the Applicant to prove the relevancy of the information sought. As the prosecuting Garda was in a position to give evidence of stopping the motorist for the offence detected, the motorist would be aware of what offence he was detected for. Subsequently this information was transmitted electronically to a Central Processing Unit and the motorist in due course received a Notice, being a Fixed Penalty Notice giving him 28 days in which to discharge the penalty and in failing to do so a summons would issue automatically from the Central Processing Unit. When the Defendant came to Court the Garda would give evidence of the offence and despite the introduction of the new technology for the issuing of summonses the Defendant was in the same position to put forward contradictory evidence as that offered by the Prosecution. For example, if he was stopped for a speeding offence and subsequently received from the Central Processing Unit a summons for failure to wear a seatbelt then it was a simple matter of evidence to be adjudicated on and for a decision to be made by the Court.

24. I then briefly proceeded to address the court in general terms in respect of some of the categories that were sought.

25. In respect of categories 5 and 6 I pointed out to the court that the handheld computer and the mainframe computer software would be protected by the proprietary intellectual property of the manufacturers who would be most reluctant to disclose this software for obvious reasons.

26. In respect of category No. 19 (i.e. "Copy of transmission log from the terminal since the date of introduction showing all dispatches and arrivals and transmission failures"), I said this would place an intolerable burden on the Garda Síochána both from resources and man-hours if there was an expectation that all dispatches and arrivals and transmission failures since the introduction of the new scheme would be a prerequisite to the prosecution of a Fixed Penalty Offence.

27. In respect of Item No. 22 (i.e. "The names of all non Garda personnel dealing with the processing of the data"), I indicated again that this placed an intolerable burden on manpower resources to have to comply with the requirement to provide the names of all Non Garda and Garda personnel dealing with the processing of the data. I said this would involve the introduction of a regime of ensuring that if the Court was mindful of granting the Order as sought that the Garda in complying with such an Order would have to ensure absolute accuracy in respect of information furnished and that some of the items sought such as Items No 19 and 22 were not relevant having regard to the nature of the offence being prosecuted.

28. I referred the respondent to the Supreme Court decision of *McGonnell v. The Attorney General* [2007] 1 ILRM 321. I pointed out that a Judgment of Chief Justice Murray related to the legislative framework which did not permit the giving of an independent breath sample to a Defendant and accordingly his ability to have same independently checked which was somewhat similar to the present case in so far as the detected motorist did not obtain a printout at the time of the input of the details into the handhled [*sic*] computer. I referred generally to the judgment and pointed out to the Court that the Supreme Court upheld the decision of the High Court and that after hearing expert evidence as to the integrity or otherwise of the technology used to determine the level of alcohol in a persons breath, Judge McKechnie decided the technology of the machine was acceptable and furthermore the Oireachtas had determined this was to be the regime and it was not a matter for the Courts to go behind and question.

29. I stated on at least two occasions that if the disclosure application in respect of the categories that the State had not consented to was to proceed then Mr. O'Dwyer should call expert evidence in respect of the matter sought and the State would seek to have the person in charge or a delegated nominee of the Central Processing Unit called as a witness as well as some representative of the manufacturer of the handheld computer and the mainframe computer being called to satisfy the Court of the integrity of the system in place and to clarify the position in respect of the categories of disclosure sought. Furthermore I indicated it was my understanding in the *McGonnell [McGonnell v. The Attorney General* [2007] 1 ILRM 321] judgment that at no stage was the software of the intoxiliser machine produced to any party. I pointed out that if the court accepted that this was the correct way to proceed and there was a relevancy hearing held and on the conclusion of the court's determination either Mr. O'Dwyer or indeed the State were dissatisfied with the extent of the discovery awarded the matter could be aired in a higher forum.

30. I say that despite the fact that I asked the Respondent to engage in such a relevancy hearing, he refused to do so.

31. I referred to the affidavit of Mr. O'Dwyer and in particular paragraph 15 thereof where he stated that:-

> "The procedure is clearly flawed. This is known by persons in the highest position in An Garda Síochána to be a fact. The Prosecutors themselves are giving evidence in ignorance."

I said that this was a very serious allegation to be made in a sworn Affidavit by an Officer of the Court and that he should either withdraw the allegation or alternatively prove it by calling evidence. I say that Mr. O'Dwyer neither withdrew the allegation nor backed it up by placing any evidence to support it before the Court.

32. In reply Mr. O'Dwyer adverted to the fact that I referred to the statutory basis for the introduction of the technology and he requested to me to point out and produce the statutory basis for the introduction of the new technology. I did not have this information to hand and informed the Court what we were dealing with today was the relevancy of the extent of the discovery being sought by Mr. O'Dwyer.

33. Without giving any reasons, the Respondent then made an Order in terms of the letter of Mr. O'Dwyer in respect of the 29 items. The Respondent did not state that he was making a finding that any of the categories sought were relevant.

34. The respondent then adverted to the previous Order made in the *Oliver Sweeney* [*Director of Public Prosecutions v. Oliver Sweeney* (Unreported, District Court, Geoffrey Browne J., 21st February, 2007)] case which was not complied with and said the State had withdrawn that prosecution. He stated that this was "disgraceful". I say and believe that the Respondent was clearly influenced in making the Order that he did in the present case by his displeasure at the fact that

the prosecution had dropped the Sweeney prosecution. I believe that this resulted in the perfunctory nature of the hearing in the present case and the failure of the Respondent to agree to hold a relevancy hearing.

35. Mr. O'Dwyer made an application for costs pursuant to Order 31 of the District Court Rules which I resisted pointing out that Order 31 was not the appropriate order and if he was granting Costs even pursuant to Order 36 they could not be awarded against the DPP. Mr O'Dwyer referred to a judgment of *Great Southern Railways v. Iarnród Éireann* which was a precedent for the granting of costs and the Respondent granted costs measured in the sum of €500.00. The Respondent further ordered that the Replying Affidavit to be filed by the 19th December, 2007.

36. I say that I do not know the basis on which the Respondent came up with the figure of €500.00 or what jurisdiction he was purporting to invoke in awarding the said sum…

38. When the Respondent was giving his reasons he adverted to the non-compliance of his Order in the *Oliver Sweeney* [(Unreported, District Court, Geoffrey Browne J., 21st February, 2007)] case. I pointed out to the Respondent that I most certainly and indeed Superintendent Keaveney who was present in Court that day and who I consulted the previous night had not appreciated that the Order which the Judge had made in the Sweeney case was in any way intended to cover other cases in Court that day or any subsequent cases that had been brought to Court. I said all I had in my possession was the Gary Doyle order made in the Court in the case of *Director of Public Prosecutions -v- Oliver Sweeney* [(Unreported, District Court, Geoffrey Browne J., 21st February, 2007)] but not in any other case.

39. I say that the Respondent then proceeded to make identical orders in six other speeding cases that were before the court. I say that he did so simply on the basis of the within case and without any further hearing.

40. I say that since that date the Respondent has made identical orders in four other cases. For example on the 17th October, 2007, similar orders were made in four other cases.

41. I say that it therefore appears that the Respondent intends to make this a standard order in all such cases to come before him.

42. I say and am instructed that the DPP is extremely concerned that such wide ranging disclosure orders are being made without a proper relevancy hearing where these orders have effectively brought eleven prosecutions to a standstill.

43. On the 1st October, 2007 I lodged an Application for a Case Stated. I say that I have since been advised by Counsel, that since no evidence as to the relevancy was heard and as no findings of fact were made by the Respondent, Judicial Review Proceedings are more appropriate.

44. I say that if given the benefit of a relevancy hearing the prosecution will adduce evidence of, *inter alia*, the following matters:

(i) Is the material sought in the possession of the Gardaí;

(ii) Is the material physically present in the jurisdiction;

(iii) What would be involved in assembling the material in terms of difficulty, man-hours etc;

(iv) Is the material relevant to the question as to whether or not the machine was working properly on the date of the alleged offence; and

(v) What is the date when the machine was introduced.

45. I say that, as the State Solicitor, I am doing my best to deal with a difficult situation whereby requests for 29 separate categories of disclosure are now being made and granted as of course in simple summary prosecutions for example speeding. I say that I am bona fide trying to deal with the matter and it is most unhelpful for allegations suggesting that there is some sort of deliberate cover-up being engaged in to have been made.

46. I say and am informed that the DPP hopes that the within judicial review will bring some clarity to the situation."

The Law

7. There is no statutory duty on the prosecution to disclose evidence in cases where the matter is dealt with by summary trial, whether the matter is a summary offence or an indictable offence dealt with in a summary fashion. Nevertheless it is established now that there is a constitutional obligation to disclose certain evidence in some circumstances where the proceedings are summary in nature. Geoghegan J. in Whelan v. Kirby [2005] 2 I.R. 30 stated that:-

> "There is jurisdiction in the District Court to make any order that would be necessary for the fulfilment of the constitutional obligation of a fair trial and fair procedures." (At p. 43)

8. In the *Director of Public Prosecutions v. Gary Doyle* [1994] 2 I.R. 286, Denham J., speaking for the five judge court, held that there was an obligation on the District Court judge to decide on the facts of the case before him or her whether the interests of justice required that statements or documents be furnished to the defendant. Four charges of the indictable offence of burglary were being disposed of by way of summary trial in the District Court and the question arose as to whether there was a general obligation on the prosecution to furnish, on request, the statements of the proposed witnesses for the prosecution. The second question posed, in the event of the first question being answered affirmatively, was whether such an obligation extended to a case where no statements had in fact been taken from witnesses interviewed by the An Garda Síochána in the course of the investigation. The defendant appealed the decision of Geoghegan J. in the High Court and in dismissing the appeal Denham J. made the following statement:-

> "The more serious cases, and the more complex cases, may require that copies of statements and other relevant documents be furnished in advance of the trial, to inform the accused of the accusation so that he may prepare his

defence.

9. Amongst the matters which a District Court judge may find relevant when deciding whether or not constitutional justice requires statements or documents to be furnished include:-

> (a) the seriousness of the charge;
>
> (b) the importance of the statements or documents;
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> (c) the fact that the accused has already been adequately informed of the nature and substance of the accusation;
>
> (d) the likelihood that there is no risk of injustice in failing to furnish the statements or document in issue to the accused." (At p. 302)

10. Although the principles enunciated by Denham J. in *Director of Public Prosecutions v. Gary Doyle* [1994] 2 I.R. 286 related to an indictable offence summarily tried, Geoghegan J. in *Whelan v. Kirby* [2005] 2 I.R. 30, a case where the accused sought inspection of the intoximeter was of the opinion that the same principles should apply in such summary offences. At p. 44 of the judgment he states:-

> "I think that the inspection applications sought in these cases were of a different nature from a 'Gary Doyle' application but they were based on the exact same constitutional principle and I see no reason why the District Court would not have jurisdiction to rule on whether and in what circumstances the intoximeter could be inspected."

11. This case, of course, concerned the very instrument that actually recorded the offence i.e. the intoximeter, in contrast to the present case where we are concerned, at least in part, with what is in effect and an electronic notebook.

12. In *McGonnell v. the Attorney General* (Unreported, High Court, 16th September, 2004) the constitutionality of the whole evidential breath test procedure was upheld on the basis that the accused had a right of inspection. McKechnie J. in that case stated that:-

> "…it is in my view an important assurance for an accused person to know of his right to have access to a judicial authority for the purposes of seeking inspection facilities in respect of any given machine. When so deciding, the court in question must of course comply with constitutional justice and fair procedures on any such application so made, as it must on the hearing of the section 49 charge itself. In both instances it may vindicate such rights of the defendant in the most appropriate manner available. These observations equally apply to any application in respect of documentation." (At p. 92)

(See also McMenamin J. in Director of Public Prosecutions v. Ní Chonduin [2007] IEHC 321, at para. 79; and Laffoy J. in *Maher v. Judge O'Donnell* [1995] 3 I.R. 530, at 536.)

13. It is clear, therefore, that in such summary trials it is for the District Court judge to determine whether it is necessary in the interest of justice and fair procedures for the accused to be furnished pre trial with relevant information, (Supra Denham J. in *Director of Public Prosecutions v. Gary Doyle* [1994] 2 I.R. 286 at p. 302.)

14. McCarthy J. (as he then was) in the *People (Director of Public Prosecutions) v. Tuite* [1983] 2 Frewen 175 states the general principal with exceptional clarity:-

> "The constitutional right to fair procedures demands that the prosecution be conducted fairly; it is the duty of the prosecution, whether adducing such evidence or not, where possible, to make available all relevant evidence, parol or otherwise, in its possession, so that if the prosecution does not adduce such evidence, the defence may, if it wishes, do so." (At. 180 – 181)

15. It is important to emphasise, therefore, that the right to disclosure is not an unlimited one. It should be available if it is necessary to ensure a fair trial and fair procedures and where justice demands it. It also only extends to relevant evidence which is in the prosecution's possession. In determining what is relevant, it is helpful to bear in mind the indicators specified by Denham J. in *Director of Public Prosecutions v. Gary Doyle* [1994] 2 I.R. 286. Finally, in determining what is just in cases such as this, one must appreciate that justice is not only about the rights of the accused. There is also the public interest in the successful prosecution of offences to be taken into account and, in the context of summary proceedings where it is intended that justice should be dispensed in a simple and speedy manner, inordinate expense must be avoided. Commonsense and proportionality are also factors which have to be considered in the weighing exercise which the District Court judge must undertake in exercising his discretion.

16. In addition to the above considerations it is clear that a basis for any such application must be properly established.

> "Normally, therefore, a basis would have to be laid before a relevant complaint of non-preservation or refusal of permission to inspect was made." (Per Geoghegan J., in *Whelan v. Kirby* [2005] 2 I.R. 30 (at p. 44)

17. In relation to disclosure, the Court of Criminal Appeal in the *Director of Public Prosecutions v. McCarthy* (Unreported, 25th July, 2007) made the following statement:-

> "The court is satisfied, however, that the obligations of disclosure are not limitless nor are they to be assessed in a vacuum or upon a purely theoretical or notional basis. Nor is a conviction to be regarded as unsafe per se simply because there has been a partial failure by the prosecution to meet the obligations of disclosure. It is a question of degree in every case, having regard to the nature and importance of the material in question." (At p. 29)

18. Later, the court continues:-

> "In the latter case, [*McFarlane v. Director of Public Prosecutions* [2006] IESC 11] in stressing the need for an applicant to establish a risk of an unfair trial, Hardiman J. stressed:-
>
> > '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. Failure to do this was the basis of the failure of the applicant in *Scully [v. Director of Public Prosecutions*] [2005] 1 I.R. 242.'

These cases stress that commonsense parameters must govern the scope of the duty to seek out and preserve evidence and the consequences of any supposed failure to do so in a particular case. As Hardiman J. noted in *Dunne v. Director of Public Prosecutions* [[2002] 2 I.R. 305], 'no remote, theoretical or fanciful' possibility should lead to a prosecution being prohibited. Repeating this in *Scully v. Director of Public Prosecutions* [2005] 2 ILRM at 216 he added:-

> 'one is concerned, first and last, with whether there is a real risk of an unfair trial. Obviously this will depend on the individual circumstances of each case'." (At p. 31)

19. Although the above remarks were applied in the context of the prosecutor's obligation to seek out and preserve evidence, it is my view that they are equally apposite in the present circumstances.

20. Applying the above principles to the present case I have come to the following conclusions.

1. The notice party in the present case has not laid the factual basis for such a wide ranging application as is sought in this case. He has not claimed, for example, that he can prove that he was not exceeding the speed limit or that the vehicle was not in the locality on the day in question. As the authorities have established, some such factual basis is required before a disclosure order will be made.

2. Neither has the notice party shown in any specific way that failure to make such disclosure would increase the risk of an unfair trial. He has not, in Hardiman J's language (*McFarlane v. Director of Public Prosecutions* [2006] IESC 11), engaged "in a specific way with the evidence actually available so as to make the risk apparent".

3. The authorities referred to above, where the Irish Court's have indicated willingness to order disclosure, invariably limit the right to disclosure to relevant material. In the present case the respondent refused to consider a request by the applicant for a relevancy hearing in spite of the fact that in the case of many of the items in the notice party's application it would be difficult to appreciate their relevancy without further explanation or expert evidence. For example, how could the names of all civilians employed by the police force in the processing operation, or the training of the user of the relevant machines/computers, or the training of the teacher of the users, or the software licence of the computers be assumed to be relevant without a detailed explanation or without hearing expert evidence? The respondent did not investigate any of these matters but simply granted an order to the notice party's solicitor for every item requested. In *Kenny v. Judge Coughlin* [2008] IEHC 28 the applicant who sought to quash his conviction for a speeding offence, claimed that the prosecution had failed to produce any evidence of his speed save for the uncorroborated evidence of the prosecuting garda. On the second ground advanced by the applicant that the respondent failed to order disclosure contrary to fair procedures the letter seeking disclosure raised 154 separate queries some of which involved multiple demands for information. In refusing to uphold the applicant's complaint in that regard, O'Neill J. stated:-

> "In my view, in a summary proceeding in respect of a speeding offence, the disclosure ordered by the respondent was entirely appropriate. The 15-page letter of the 24th October, 2006 with 154 requests for information and documents, was a preposterous exercise in summary proceedings and the demand for disclosure in terms of that letter was rightly rejected.
>
> The first respondent cannot be faulted, if it was the case that the two letters which Garda Ryan says he sent to the applicant or his solicitor were not received. In light of the fact that the applicant acknowledged through his counsel that he had seen the précis of Garda Ryan's evidence on the morning of the trial, i.e. the 5th December, 2006, and having regard to the simplicity of the evidence, in my view it cannot seriously be said that in a summary prosecution for a speeding offence, the applicant's right to natural justice and fair procedures was breached by the first respondent in refusing to adjourn the hearing of the complaint." ([2008] IEHC 28, at p. 11 – 12)

The disclosure made by the respondent in the present case, without a relevancy hearing, does not have regard to the "commonsense parameters" to borrow the language of Hardiman J., in a slightly different context, in *Dunne v. Director of Public Prosecutions* [2002] 2 I.R. 305. This may be especially so where some of the material ordered to be disclosed may be the subject of a confidentiality clause with the manufactures/owners of the computers or of the software involved.

4. Applying the criteria underlined by Denham J. in Director of Public Prosecutions v. Gary Doyle [1994] 2 I.R. 286. as matters which the District Court judge may find relevant when deciding whether constitutional justice requires disclosure to the respondent's order in this case, one would have to conclude that the balance in the present case is against the wide ranging disclosure made by the respondent without a relevancy hearing. The charge against the notice party is not a particularly serious one, the importance of the material sought has not been established in respect of all documents sought, the applicant has clearly been informed of the nature and substance of the charge and it is not obvious that failure to disclose risks an injustice.

The supplemental affidavit of Seamus Hughes, on behalf of the applicant, emphasises the nature of the hand held device used by the garda in this case at para. 7 of that affidavit he states:-

> "It is important to note the nature of the hand-held device in respect of which the disclosure is sought and what function it performs. The device plays no role in the measurement of speed. The speed of the car is detected by a completely different instrument. Rather the hand-held device is simply an electronic notebook. In the past, when a car was detected speeding the Guard would enter the relevant details by hand into a normal notebook which contained the appropriate forms. Now the details are entered into the electronic notebook. The information in that notebook is then processed centrally and a summons is issue[d]." (At para. 7)

At para. 14 of the same affidavit, Mr. Hughes challenges Mr. O'Dwyer's statement in his affidavit at para. 16 where he suggests that the handheld notebook is "analogous to similar orders in relation to an intoxilyzer". Mr. Hughes challenges this by saying:-

> "I say that the difference between an Intoxilyzer and the hand-held device at issue here is that the Intoxilyzer

> actually measures the alcohol in the suspect's breath whereas the hand-held device does not measure anything but simply acts as an electronic notebook. Thus the correct analogy would be if someone in an Intoxilyzer cases were to seek dozens of categories of disclosure in respect of the computer which the Gardaí used to input the details which leads to the issuing and the wording of the summons." (At para. 14)

Furthermore, the respondent appears to be prepared to make similar orders whenever these kind of speeding cases come before him thereby effectively preventing any prosecution being pursued in the area of his jurisdiction. This position appears to be taken by the respondent in spite of the fact that there is a strong averment by the State solicitor that there never was "a test case" in the matter. I accept the State's averment in that regard. For clarity too I find that there is no evidence before the court that there is a concerted effort to conceal a flawed procedure as alleged by Mr. O'Dwyer.

5. The height of Mr. O'Dwyer's averment, on behalf of the notice party, is that nowadays a modern electric notebook is being used to record the time, the place and the speed of a vehicle before being sent to the central administrative office for processing, and that the notice party has no opportunity to examine the whole process from beginning to end. To grant such a far reaching order for disclosure without having a relevancy hearing to ground it on a specific factual basis and without an investigation into whether a denial of such disclosure would amount to a real risk of an unfair trail for the notice party, does not in my view respect the concept of proportionality or the public interest in the matter or the need for the "commonsense parameters" which Kearns J. emphasises in *Director of Public Prosecutions v. McCarthy* (Supra). In relation to the public interest consideration it is well to recall the dicta of Denham J. in *B. v. Director of Public Prosecutions* [1997] 3 I.R. 140 with whom the four other members of the Supreme Court agreed when she stated:-

> "It is not the applicant's interest only which have to be considered. It is necessary to balance the applicant's right to reasonable expedition in the prosecution of the offences with the community's right to have criminal offences prosecuted." ([1997] 3 I.R. 140, at p. 195 – 196)

For the above reasons I would order that the matter should be remitted to the respondent to enable him to carry out a relevancy hearing to determine more specifically which if any of the matters sought by the notice party should be disclosed.

Order

21. For the above reason I grant an order of certiorari quashing the order made by the respondent on 19th September, 2007, making an order for disclosure in favourer of the accused against the prosecutor for the items listed in a letter by Messrs Crean Cleirigh and O'Dwyer Solicitors to Superintendent of An Garda Síochána, Swinford, Co. Mayo dated 25th June, 2007, and awarding costs of €500.00 to the applicant.

22. I further make an order remitting the matter back to the respondent to enable him to carry out a full relevancy hearing in relation to the matters sought by the notice party in the letter of his solicitor to the Superintendent, An Garda Síochána, Swinford, Co. Mayo dated 25th June, 2007.