Neutral Citation No: [2010] IEHC 232

THE HIGH COURT

JUDICIAL REVIEW

2009 25 JR

BETWEEN

PATRICK IRWIN

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

AND HER HONOUR JUDGE PATRICIA RYAN

RESPONDENTS

JUDGMENT of Kearns P. delivered the 23rd day of April, 2010.

This is yet another application brought on behalf of an accused person seeking to stop a criminal trial from taking place. It invokes jurisprudence in relation to the obligation on the prosecution to seek out and preserve evidence and stresses the consequences alleged to flow from "missing evidence" as delineated in decisions of both the High Court and the Supreme Court.

The basic principles upon which this and other applicants rely in bringing such applications was enunciated by Lynch J. in Murphy v. D.P.P. [1989] I.L.R.M. 71 in which he stated at p.76:-

> *"The authorities establish that evidence relevant to guilt or innocence must insofar is necessary and practicable be kept until the conclusion of the trial. These authorities also apply to the preservation of articles which may give rise to the reasonable possibility of securing relevant evidence."*

That case did not of itself prompt the onset of multiple applications to court to halt trials where allegations of failures to collect or preserve all possibly relevant evidential material were made. That process only began following the decision of the Supreme Court in D.P.P. v. Braddish [2001] 3 I.R. 127, a case in which an alleged failure by the gardaí to preserve video footage which had been in their possession led to a prohibition of the trial of the accused in that particular case. That decision was followed by a significant increase in applications to the courts to halt trials where some real or perceived injustice might be said to have arisen through the non preservation or failure to obtain a particular piece of evidence. In any given instance, the applicant for relief has invariably claimed that non availability of the particular item, be it a video or motor car or some other object, was highly prejudicial and would prevent the holding of a fair trial, regardless of rulings or directions which might be given by judges who, in most instances, were and are highly experienced in criminal law.

I do not wish to be taken as criticising the decision in Braddish itself, but the sheer volume of applications to court which ensued thereafter suggests to me that a perception took hold amongst practitioners that an application to court to halt a trial was an option worth exercising where any shortfall in prosecution proofs of this nature could be identified. Leaving aside ex tempore decisions of the High Court I am aware of judgments of either or both the High Court and Supreme Court in the following cases: Dunne v. D.P.P. [2002] 2 I.L.R.M. 241; Bowes v. D.P.P.; McGrath v. D.P.P. [2003] 2 I.R. 25; McKeown v. Judges of the Dublin District Court & Anor. [2003] I.E.S.C. 26; Fagan v. The Judges of the Circuit Criminal Court & Anor. [2006] I.E.H.C. 151; McFarlane v. D.P.P. [2006] I.E.S.C. 11; Ludlow v. D.P.P. [2008] I.E.S.C. 54 ; Savage v. D.P.P. [2008] I.E.S.C. 39; Scully v. D.P.P. [2005] 1 I.R. 242; McHugh v. D.P.P. [2009] I.E.S.C. 15; Perry v. D.P.P. [2008] I.E.S.C. 58; Cole v. A Judge of the Northern Circuit & Anor. [2005] I.E.H.C. 193; Leahy v. D.P.P. & Anor. [2010] I.E.H.C. 22; Keogh v. D.P.P. [2009] I.E.H.C. 502; Baltutis v. His Honour Judge Michael O'Shea & Anor. [2009] I.E.H.C. 402; Molloy v. D.P.P. [2006] I.E.H.C. 1; Kearney v. D.P.P. [2009] I.E.H.C. 347; O'Driscoll v. D.P.P. [2006] I.E.H.C. 153; Byrne & Anor. v. Judges of the Circuit Court & Anor. [2007] I.E.H.C. 366; English v. D.P.P. [2009] I.E.H.C. 27 and C.D. v D.P.P. [2009] I.E.S.C. 70.

The following citation from the judgment of Fennelly J. delivered in C.D. v. D.P.P. [2009] I.E.S.C. 70 sums up very aptly the increasing sense of judicial exasperation with the growth of the cottage industry in bringing applications of this nature. In that case he stated:-

> *"1. This is yet another 'missing evidence' case. Since the decision of this Court in Braddish v Director of Public Prosecutions [2001] 3 I.R. 127, many applications have been made to the High Court, and many of them appealed to this Court, for prohibition of criminal trials on the ground that some piece of evidence has been lost or never been retrieved by the gardaí. This Court has heard no less than eight such appeals in less than two years. It is not easy to avoid the suspicion that a practice has developed of trawling through the book of evidence in search of the silver bullet—rather the absent missing bullet—which can put a stop to any trial.*
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> *…*
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> *24. As has been emphasised many times, this type of application must be considered in the context of all the evidence likely to be put forward at the trial. The key question whether there is a real risk of an unfair trial cannot be viewed in vacuo. Evidence is never perfect. Neither the prosecution nor the defence can be assured that all conceivable evidence will be available."*

The legal principles applicable to such cases were comprehensively set out in the judgment of Denham J. in Ludlow v. D.P.P. [2008] I.E.S.C. 54 when she stated:-

> *"I am satisfied that the following are relevant principles:-*

(i) Each case requires to be determined on its own particular circumstances.

(ii) It is the duty of the Court to protect due process.

(iii) It is the duty of An Garda Síochána to preserve and disclose material evidence having a potential bearing on the issue of guilt or innocence, as far as is necessary and practicable.

(iv) The duty to preserve and disclose, as qualified by Lynch J. in Murphy v. D.P.P., cannot be defined precisely as it is dependent on all the circumstances of the case.

(v) The duty does not require An Garda Síochána to engage in disproportionate commitment of manpower and resources and must be interpreted in a fair and reasonable manner on the facts of the particular case.

(vi) In the alternative to keeping large physical objects as evidence, such as motor vehicles, it may be reasonable in certain circumstances for the garda to have a forensic report on the object.

(vii) However, an accused should, in general, be given an opportunity to examine or have examined such evidence.

(viii) If the evidence no longer exists the reason for its destruction is part of the matrix of the facts, but it is not a determinative factor in the test to be applied by the court.

(ix) These principles are subject to the fundamental test to be applied by the court, that being whether there is a real risk of an unavoidable unfair trial, as described by Finlay C.J. in Z. v. Director of Public Prosecutions [1994] 2 I.R. 476 where at p.506, he stated:-

> This Court in the recent case of D. v. The Director of Public Prosecutions [1994] 2 I.R. 465 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 ground 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'."

BACKGROUND TO THE PRESENT CASE

The applicant stands charged with a number of serious drug offences arising from events which took place on the 2nd day of October, 2006, at Doon, Boyle, Co. Roscommon.

On that occasion, as appears from the Book of Evidence exhibited in the applicant's affidavit, it will be alleged that a well organised stakeout and surveillance operation had been placed in position by the Divisional Drug Unit in Sligo. The applicant was the subject matter of the particular surveillance operation which involved a large number of members of the gardaí, including members of the armed unit thereof. The proposed statements of evidence of a large number of garda witnesses is to the effect that the applicant was seen to leave his house in Sligo and get into a silver Volkswagen Golf motorcar, Reg. No. 03D6455, accompanied by another male, and to travel to a rural and isolated location at Doon, Boyle in the County of Roscommon. Other members of the gardaí had taken up surveillance positions at different locations nearby and, in particular, on a narrow stretch of roadway leading from the N4, the main Dublin – Sligo road. Shortly after 2 p.m. on the date in question, a dark coloured Mercedes motorcar, driven by one Kenneth McEneaney, pulled up on a remote country road at Doon. Some time later the Golf motorcar driven by the applicant arrived at that location and pulled in behind the Mercedes. The vehicles were about five feet apart. The applicant was allegedly observed by gardaí alighting from his car. He was wearing surgical gloves and carrying a plastic bag which appeared to be weighted. He got into the front passenger seat of the Mercedes.

Almost immediately, a signal was given by the officer in charge to direct the gardaí to intervene. The statements of the proposed witnesses indicate that the applicant initially tried to get out of the Mercedes, however, when he saw the gardaí he got back into the car and pressed down the locking button. He was then observed to push a plastic bag towards the central console of the car. He had a mobile phone in his hand and is alleged to have shouted to the driver of the Mercedes: "drive, drive". However, the driver of the car was removed and restrained and the gardaí pulled up the button of the door from the inside and removed the applicant from the vehicle.

There were a large contingent of gardaí present at the scene and shortly afterwards the applicant was arrested under s. 25 of the Misuse of Drugs Act, 1977 on suspicion of the possession of controlled drugs for the purpose of sale or supply at Doon, Boyle, in the County of Roscommon.

The scene at Doon, including both vehicles, was the subject of photographs taken by Garda Gallagher. Having photographed the inside of the Mercedes from which the two men had been so recently removed, two plastic bags were removed from the front passenger area of the Mercedes. One bag which was open on the passenger seat contained white powder which, when subsequently analysed, is alleged to have consisted of one kilogram of cocaine, with a street value in excess of €70,000. The other bag found in the Mercedes was located in the passenger foot well area and is said to have contained €55,000 in cash. Two mobile phones were found in the Mercedes, as well as a pair of disposable gloves.

After his arrest, it is alleged that the applicant was detained at Sligo garda station where he was video-interviewed on a number of occasions. At the first interview, he stated that he had been waved down by a man in the Mercedes and asked for directions and as it was wet he got into the car. Although informed that he had been seen taking the package containing cocaine from his own car to the Mercedes, he denied having had the package of cocaine in his possession. He declined to say whether or not he had his mobile phone with him, notwithstanding that it is contended that DNA analysis and telephone data received from one of the phones found in the car confirm that it was his. The applicant, as was his entitlement, did not engage during the course of garda interviews with the various exhibits put to him. It cannot be over-emphasised that, notwithstanding the apparent strength of the prosecution case, the applicant enjoys a presumption of innocence in respect of the crime alleged.

In the course of these proceedings Superintendent James Kearins has sworn on affidavit that he wrote to the applicant's then solicitors, Messrs. McGovern Walsh & Co., to ascertain whether they wished to have either of the vehicles independently examined.

He also deposes that he spoke with Mr. McGovern on 23rd October, 2006 and requested that his letter receive immediate attention. Superintendent Kearins also deposes that he communicated with the solicitor for the co-accused Kenneth McEneaney who responded by letter dated 23rd October, 2006, requesting the immediate return of the Mercedes motor vehicle. By letter dated 21st November, 2006, Mr. McGovern simply stated that he was reserving his position but asked for confirmation that both vehicles would be preserved for forensic examination.

However, it is quite clear that nothing further happened insofar as any examination of the Mercedes was concerned, nor was any interest expressed by or on behalf of the applicant in that vehicle, until the trial of the applicant became imminent in November, 2007. By letter dated 8th November the applicant's solicitor wrote to Mr. Kieran Madigan, State Solicitor, requesting a forensic examination of the vehicle.

In making a reply on the 12th November, 2007, Mr. Madigan stated:-

> *"I also wished to point out that I have today in the DX received a letter of the 8th Nov., requesting at this late stage forensic examination of motor vehicle. This was not sent by fax and the first notification I have of it is today. Again this application should of course have been made long since bearing in mind the period of time since Book of Evidence was served herein and your client was returned for trial. I am entirely without prejudice inquiring from the Gardaí as to whether or not that vehicle remains available and if so then facility of examination will be made available."*

At the same time a request was made to transfer the trial of the applicant to Dublin, notwithstanding that preparations for a trial in the local circuit had been completed and the trial was imminent. An order transferring the case to the Dublin Circuit Court was made on the 15th of November, 2007, by the local Circuit Judge sitting in Tullamore.

It is clear from the order made by the Circuit Court, however, that the applicant was on bail and I must assume that position continued thereafter while this case made its way up the list of cases fixed for trial in the Dublin Circuit Court.

DECISION

The application for leave to bring judicial review proceedings was only brought in January, 2009. Given that the gardaí had written to the applicant's solicitor as far back as 27th November, 2007, advising the applicant's solicitor that Mr. McEneaney's car had been returned to him on the 24th October, 2006, it is difficult to understand how or why, having regard to the delay in seeking relief in this case, leave was ever granted in the first instance. Surprisingly, no application was brought by or on behalf of the respondent to have the leave set aside for this reason. In my view, it should have been.

Be that as it may, the trial-stopping application finally proceeded to a hearing and conclusion before this Court in April, 2010, some three and a half years after the alleged offence and three years after the delivery of the Book of Evidence in the case. The public interest in seeing serious crime prosecuted to conclusion has been placed in abeyance during that period given that these judicial review procedures invariably result in a stay being placed on the proposed trial. The applicant has thus secured a very significant benefit from the tactics deployed, though fortunately in this case most of the witnesses are garda witnesses and not lay witnesses whose attendance after such a long interval may have been more difficult to secure.

Despite lodging with the Court a Book of Evidence comprising several hundred pages, the Court was not informed as to why the transfer of the trial to Dublin was sought or why it was necessary. More importantly, however, this Court has not been informed as to what useful material might have been gleaned from an examination of Mr. McEneaney's motorcar by a forensic expert retained on his behalf or by anyone else for that matter. Given that the applicant was observed by a large number of the gardaí at the scene to have been wearing surgical gloves, it is difficult to see what relevance or impact the absence of his fingerprints in the Mercedes motorcar might have on his capacity to defend himself in circumstances where he was identified by a number of witnesses at the scene and where he himself asserted he had been sitting in the Mercedes motor car for only a short few moments before he was removed from it by the gardaí.

I am quite satisfied that any supposed "failure" on the part of the garda authorities to retain the Mercedes motorcar did not, and could not have, yielded or produced any information which, on the facts of this particular case, could have been of the slightest use or value to the applicant.

This application, in my view, is one completely without merit. To make matters even worse, an effort was made during the course of submissions before this Court to pin blame on the applicant's previous solicitors for the failure both to seek an examination of the vehicle and to bring earlier judicial review proceedings. It would appear papers were drafted in 2008 for the bringing of some such application which, however, never got off the ground. When ultimately leave to bring the present judicial review proceedings was given on particular grounds, those grounds did not include any supposed negligence or failure on the part of the applicant's previous solicitors, although the allegation is contained in the applicant's affidavit sworn on the 12th January, 2009. No explanation has been offered either for the failure of the applicant's previous solicitors to move the proposed judicial review application at an earlier stage or for the failure to include such a ground amongst the other grounds relied upon when seeking relief in the judicial review leave application which did proceed.

I have no hesitation in refusing the relief sought in this case for all the reasons outlined above.

I would add the following comments. At present, the bringing of such applications almost as a matter of routine to prevent a trial taking place represents a grave abuse of the legal process. One can only imagine the sense of frustration, bewilderment and loss of confidence in the criminal justice system which is engendered in the minds of the victims of crime by the delays created by unmeritorious applications. This is particularly so where families have suffered bereavement or severe physical or psychological injury as a result of the alleged crime. It seems to me that sight is lost more often than not of their interests in seeing a criminal prosecution brought to a conclusion within a reasonable time.

The facts of this case persuade me that the time has come to introduce a requirement that leave applications in cases of this nature be made on notice to the respondent and that a fast track system for any subsequent trial be implemented where relief is refused so as to make up for lost time. I would be also of the view that a court of trial should, in the event of an ultimate conviction, be entitled to consider whether the bringing of an application of this nature, which is found to be devoid of merit, should rank with other factors to be considered by a sentencing court when deciding whether there should be mitigation of any proposed sentence. It should not simply be a feature of the case which evaporates into thin air.

I believe that any alleged consequential unfairness arising for an accused person from the alleged failure of the gardaí to sufficiently seek out, retrieve or preserve relevant evidence, should usually fall to be dealt with by the trial court. Applications in advance to prohibit trials should only be brought - and promptly brought at that - where an unavoidably unfair trial must clearly ensue from the alleged failure. Applications need to be clearly discouraged in every other case where only some theoretical, fanciful or remote risk may be identified.