

THE HIGH COURT
JUDICIAL REVIEW

2009 817 JR

BETWEEN

JOHN STIRLING

APPLICANT

AND

DISTRICT COURT JUDGE COLLINS

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT OF MR. JUSTICE HEDIGAN, delivered on the 25th day of February, 2010

1. By order of Peart J. dated the 27th day of July, 2009 the applicant was granted leave to apply for judicial review seeking prohibition on the continuance of criminal proceedings against him in the District Court.

Factual Background

2. The applicant was charged with certain criminal damage and public order offences relating to the early hours of March 3rd, 2009. On the date in question, Garda Monaghan, working from Pearse Street Garda Station observed via remote surveillance of CCTV, a group of young people in the Aston Quay area of Dublin kicking a telephone box and various windows. Garda Monaghan communicated this information to other members of the Gardaí who subsequently arrested the applicant in the Temple Bar area.

3. The applicant was charged with the aforementioned offences and duly appeared before the District Court in respect of those offences. However, when a defence application was made for disclosure of the CCTV footage, it transpired that it had been mislaid and was no longer available. The applicant argues that the absence of the CCTV footage severely prejudices his chance of a fair trial as its contents formed the basis of the prosecution's case. The applicant was unsuccessful before the first-named respondent in his contention that he faced a real or serious risk of a fair trial and seeks the relief sought

Procedural Background

4. The applicant was arrested on the 3rd of March, 2009. On April 3rd, the applicant's solicitors wrote a letter to Garda Garrett, of Pearse Street Garda Station, requesting a précis of the evidence and CCTV. The applicant's solicitor subsequently discovered that the CCTV footage was unavailable. The matter was heard before the first-named respondent on the 23rd of July, and the application to dismiss proceedings was refused. The within proceedings were then initiated.

The Applicant's Submissions

5. The applicant's primary complaint is that he would be unable to receive a fair trial as the missing CCTV footage constituted the sole evidence against him. As the applicant has never viewed the footage, it is argued that the quality of the footage obtained or the ability to identify the applicant from the footage are issues which the defence cannot rebut. Moreover, as the prosecution intend to rely on the testimony of Garda Monaghan, who viewed the CCTV footage, the applicant submits that he will be unable to effectively cross-examine the prosecution witness without recourse to the footage.

6. The premise of the applicant's submission is the duty of the investigating Gardaí to preserve, within reason, all evidence relative to the prosecution of the case per *DPP v. Braddish* [2001] 3 I.R. 127. In the absence of this evidence, the applicant submits that the prosecution is relying on a prosecution witness in lieu of real evidence, which fails to vindicate the right of the applicant to a fair trial. The applicant relied on the case of *Ludlow v. DPP* [2008] IESC in support of this reasoning. In that case, the applicant was facing charges of dangerous driving causing death. The Gardaí had disposed of the car and, instead, the prosecution sought to rely on forensic evidence from an expert who had viewed the car. Hardiman J. remarked that this forensic evidence would be "virtually impossible to rebut" in the absence of the real evidence. The accused would have no way of accurately gauging the thread depth of the tyres from photos in a case where "a fraction of a millimetre may be the difference between guilt and innocence".

7. In addition to the latent unfairness of mounting a defence without real evidence, the applicant specifically contended that, contrary to the views of the respondent, identification was a major issue. The applicant questioned how reliably one could be followed via remote surveillance from Aston Quay to Temple Bar and, with a degree of certainty, be identified in a busy Temple Bar Square. If identification per the CCTV footage was a major issue, and the applicant's defence was one of mistaken identity, this, it was argued, qualified this application as one of missing evidence in which the sole and pivotal source of evidence necessary to prosecute was absent.

8. The applicant further submitted that in the absence of the CCTV footage, the ability to effectively cross-examine the prosecution witness is hindered. The case of *Jason English v. DPP* (Unreported, High Court, 23rd January, 2009), in which a missing videotape was not viewed as fatal to a fair trial, was distinguished on the basis that no corroborating or

supporting evidence would accompany the prosecution witness testimony. The applicant further insisted that as Garda Monaghan had indirectly observed the events of that night, his testimony is based on missing evidence, and not a direct observation. Therefore, it was argued, the witness could not be effectively cross-examined.

The Respondents' Submissions

9. The respondents' primary contentions are as follows. Firstly, it was submitted that in assessing any such application, the Court must be cognisant of the desire for continuity of a trial, more so in a criminal context. Mr O'Malley, for the respondent, stated that, save for exceptional circumstances, a criminal trial should not be interrupted to take judicial review proceedings. In this regard Hardiman J., in the Supreme Court decision in *Mellet v. Reilly* [2002] IESC 33, supported the contention that "as far as practicable" a criminal trial should not be recessed for months on end. Hardiman J. cited with approval the dictum of Ó Dálaigh C.J. in *People (Attorney General) v. McGlynn* [1967] I.R. 232 at 239:

"The nature of a criminal trial by jury is that, once it starts, it continues right through until discharge or verdict. It has the unity and continuity of a play. It is something unknown to the criminal law for a jury to be recessed in the middle of a trial for months on end, and it would require clear words to authorise such an unusual alteration in the course of a criminal trial by jury".

O'Flaherty J, in the *Director of Public Prosecutions v. Special Criminal Court* [1998] 2 I.L.R.M. 493 cited this paragraph with approval and continued:

"While this statement applies to criminal trials with a jury, it should be regarded as a precept that should, as far as practicable, be followed in respect of all criminal trials subject to the jurisdiction of courts to grant cases stated on occasion...I would endorse everything that Carney J. said about the undesirability of people repairing to the High Court for judicial review in relation to criminal trials at any stage (and certainly not during their currency)..."

10. Further to this point, the respondent questioned the possibility of obtaining judicial review in relation to a criminal trial on a *quia timet* basis, that is, the application would anticipate an unfair trial if the prohibition were not to be granted. Citing the dictum of Gannon J. in *Clune and O'Dare and Ors. v. DPP* [1981] I.L.R.M. 17, it was submitted that there exists a "presumption that a District Justice will apply himself to his functions and duties... and within the limits of his jurisdiction with justice and fairness to the best of his ability". That is, there exists a presumption that the trial judge will fairly marshal the proceedings before him to ensure a fair trial. On this basis, the respondent expressed reservations that there exists a jurisdiction to prohibit a criminal trial in these circumstances.

11. The respondent proceeded to examine the principles applicable in missing evidence cases. The guiding dictum in this regard was cited from Finlay C.J.'s judgment in *Z v. DPP* [1994] 2 I.R. 476:

"[The] 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."

12. The respondent developed this point citing *Bowes v. DPP* [2003] 2 I.R. 25 wherein Hardiman J. stressed that "the focus in any such application must be on the fairness of the eventual trial, and not on the discovery of shortcomings in the investigative process except in so far as they impact on the prospects of an unfair trial". The respondent concluded this point stating that the test is whether the applicant has proven to the Court's satisfaction that he runs a genuine risk of an unfair trial that cannot be cured by appropriate rulings and directions of the trial judge.

13. Relating this to the facts of the case, the respondent submitted that the missing footage was not the central evidence relied upon by the prosecution. It was stressed that Garda Monaghan had observed the events in real time via CCTV, and that this, in reality, was equivalent to observing through a window or via binoculars. Moreover, as Garda Monaghan was viewing the events as they unfolded, it was argued that this was direct evidence and, as a result, Garda Monaghan could be cross examined on what he saw. Therefore, it was submitted, this was not a missing evidence case such that the applicant could not receive a fair hearing.

Decision of the Court

14. The first issue to be considered must be the desirability of interfering with a trial, which has commenced in the District Court and, moreover, in which detailed submissions on the subject matter of this application were considered by the trial judge. I would agree with the statement of the law in this area as detailed in the respondent's submissions. This is a jurisdiction that must be reserved to only the most exceptional circumstances. A *prima facie* presumption must always exist that a judge will perform his duties in a just and fair manner with due regard to the principles of constitutional and natural justice.

15. It is clear the case has commenced in the District Court and the District Court has already made an important decision in the same. The High Court should not in my view intervene. Any such intervention on the facts arising would be in the nature of a *quia timet* order which is not appropriate. No submissions have come before the Court to suggest that the District Judge would not conduct the matter fairly and indeed District Judge Collins has very correctly stated that if any prejudice appears during the rest of the hearing it will be dealt with by the trial judge.

16. The above is sufficient to dispose of the case and it is not for the Court to direct how the trial should continue before the District Court. It may, however, be of assistance if, having heard and read all submissions in this case, I express a view as to the second leg of the applicant's case.

17. It is my view that the respondent's argument is correct in that this case is not, in reality, a missing evidence case. It is unfortunate that the CCTV footage is no longer available. This set of circumstances should not have occurred and is indicative of a certain inefficiency on the part of the Gardaí in the proper storage and filing of said evidence. It is imperative that procedures in this regard be tightened up. However, the deficiency created by this error on the part of the Garda authorities is not, in my view, fatal to the case. By means of the elaborate technology deployed in the city and, in particular, at the *locus in quo*, it is now possible for the Gardaí to "see" far beyond the field of vision to which they would normally be limited. It is indeed as though they were looking through a special window or through binoculars.

18. The observing garda may give evidence of what he saw and he may be questioned as to the accuracy of his recall, the acuity of his view, the quality of the picture and the opportunity to observe. It might well be that the trial judge would ask to see an example of similar CCTV footage. It might well be that she would not. That is a matter for the trial judge who, it may be assumed, will conduct the trial in a constitutional manner respecting the right of the accused to a fair trial. It is not the function of the Court to fetter the discretion of a trial judge.

Conclusion

19. In light of the foregoing, the Court is satisfied that the applicant is not entitled to the reliefs sought. The jurisdiction of this Court to accede to an application for judicial review of a criminal trial once commenced is one which is only to be invoked in the most extraordinary of circumstances. There must exist an expectation that a criminal trial will proceed in accordance with constitutional principles of due process. In the absence of exceptional circumstances, the Court must refuse the application sought. Furthermore, the applicant has not demonstrated that there is a real and serious risk of an unfair trial. The reliability and admissibility of evidence is, first and foremost, within the remit of the trial judge, and in this regard a *prima facie* presumption stands that the District Judge will conduct the trial in accordance with Article 34. In the circumstances, the Court will refuse the application.