18/06/2015 (CM)

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 72 J.R.]

BETWEEN

JOHN GERARD MCDONAGH

APPLICANT

AND

THE COMMISSIONER OF AN GARDA SÍOCHÁNA, ASSISTANT COMMISSIONER JOHN O'MAHONEY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice McDermott delivered on 19th day of June, 2015

1. The applicant was granted leave to apply for judicial review on 4th February, 2013, (Peart J.) seeking an order of *mandamus*, or alternatively an injunction, directing the first and second named respondents to permit appropriately qualified experts access to forensic evidence gathered during the investigation into the murder and rape of Siobhan Hynes on 6th December, 1998, at Carraroe, Co. Galway. The applicant seeks to have items of real evidence submitted to new scientific procedures which, it is claimed, were discovered or became available, following the original investigation, and/or the applicant's conviction for the rape and murder of the late Ms. Hynes and the dismissal of his appeal by the Court of Criminal Appeal. A number of other related declarations are also sought.

2. The applicant was convicted on 17th June, 2001 following a 28 day trial. The jury was directed to find the applicant not guilty of a s. 2 rape in the absence of evidence of penile penetration. A sentence of life imprisonment was imposed in respect of the murder charge and a sentence of 10 years imprisonment in respect of the s. 4 rape.

3. Leave to appeal was sought against conviction and sentence, but refused in an *ex tempore* judgment of the Court of Criminal Appeal, delivered on 14th February, 2007.

4. On the 13th August 2012 the solicitors for the applicant wrote to the first named respondent (the Commissioner) requesting access to items of evidence gathered during the course of the investigation, for the purpose of submitting them to new forensic testing procedures which came into existence since the original investigation, trial and/or appeal. The letter set out in summary the conclusions reached by a forensic expert who had re-examined the case. They were said to be based upon advances in testing which had resulted in DNA being extracted and tested in cases where it was not previously possible to do so. It was claimed that the expert expressed cause for concern in respect of the applicants conviction in the light of post-trial advances in testing techniques and that these advances might show:-

> "(a) That DNA found under the deceased's finger nails might be identified and a male profile extracted which in 1999 was not possible if such DNA was masked by a female profile (only female DNA was identified in the DNA found under Siobhan Hynes' nails).
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> (b) Relevant fibres and hairs found can now be tested using new STR/DNA techniques and mitochondrial testing
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> (c) The deceased's clothing could provide 'touch DNA' samples or epithelial cells in circumstances where she was dressed in her jeans when found and as it is likely, or at least possible, that her jeans were placed back upon her body by the culprit when she was unconscious. DNA might be present on that clothing as well as on her panties."

It was argued that DNA profiles found under the deceased's nails or on her clothing "may inculpate or exculpate" Mr. McDonagh and had they been available at the time of trial might have led to evidence which would have materially affected the jury's decision.

5. A reply was received from Assistant Commissioner John O'Mahoney dated 21st November, 2012 in which he stated:-

> "Having given this matter much consideration I am of the view that I cannot accede to your request to disclose the evidence sought in the absence of a court order directing such disclosure."

6. In earlier correspondence the Commissioner suggested that the applicant should apply under s. 2 of the Criminal Procedure Act 1993 to quash the conviction on the basis of "new facts" or "newly discovered facts" and seek the directions of the Court of Criminal Appeal (now the Court of Appeal) in respect of access to items of evidence for the purpose of testing. Though there is mention in the correspondence and reference to a Garda policy permitting the forensic testing of exhibits post-trial, this is not elaborated upon in the exhibited correspondence and no evidence was adduced that An Garda Síochána operates a policy of granting such access without a court order. The request was not rejected on its merits though that aspect of the decision is not challenged in these proceedings.

The Evidence

7. No DNA evidence was adduced in this case at the trial. It was accepted that a DNA examination was carried out, but deemed to be "neutral". It is clear that the case was based largely on circumstantial evidence and on some forensic evidence based on the

significance of fibres found. All these matters were addressed in the judgment of the Court of Criminal Appeal which states that the forensic evidence which established a connection between garments worn by the applicant and garments worn by the deceased was an important piece of evidence.

8. A summary of the evidence relied upon at the trial is found in the judgment of the Court of Criminal Appeal and in the affidavit of Mr. Robinson, Solicitor. He stated that the prosecution's case relied heavily on forensic evidence based on the finding of fibres, and expert conclusions that:-

> (a) There was very strong support for the proposition that the applicant's jumper had been in contact with the deceased's clothing, and
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> (b) There was support for the proposition that the deceased had been in the applicant's car.

At the appeal, the applicant was refused leave to adduce new scientific evidence relating to fibre evidence. The remaining evidence was summarised as follows:-

> "That the applicant was not seen in the village of Carraroe between the hours of 12.50am and 1.45am during which period the prosecution contended the rape and murder of Siobhan Hynes took place; that when he was seen again after 1.45am he had changed his top; evidence that the applicant had scratches on his body and a mark on his hand the day following the death; that when requested by the gardaí to hand into the garda station the jumper he was wearing on the night of the 5th/6th December, 1998, he handed in the wrong jumper and when questioned, initially denied that he had been wearing the white jumper on which the fibres were found; that the applicant had denied that the deceased was ever in his car although fibres were found supporting the proposition that she had been."

9. Mr. Robinson states that a forensic expert gave evidence that she received all the clothing which the deceased had been wearing on the night which included black socks, navy denim jeans, a wine polo neck jumper, a dark blue fleece and a white bra in separate sealed bags. There were no positive matches for the applicant's blood or semen on any of the items. Nail scrapings only showed tissues belonging to the deceased. There was blood staining on the crotch of her jeans extending up the front, on the legs and on the seat of the jeans. No grouping was obtained from the blood. Blood on the deceased's jumper was thought likely to be her own blood as it was consistent with her own blood group, which was the same as the applicant's. The forensic report could not determine whether or not it was his blood, though from its pattern and location it was said to be consistent with the deceased's blood.

10. The clothes found at the applicant's house were also tested for evidence of contact with the deceased, but no blood grouping was possible. No head hairs matching the deceased were found in the applicant's car. There were very few head hairs on the deceased's clothes and none matched the applicant. Other hair samples were not distinctive enough to look for matches amongst the hairs in the car. Finger and palm prints were taken from the deceased and all items of evidence were negative for fingerprints. No useful prints were found on the applicant's car seat or on the items from the car. All of the evidence, including that highlighted by Mr. Robinson, was thoroughly reviewed by the Court of Criminal Appeal which considered in detail suggested weaknesses in the prosecution case and, in particular, the suggested inadequacy of the circumstantial evidence relied upon.

11. A number of years after the decision of the Court of Criminal Appeal a group known as the "Irish Innocence Project" submitted the applicant's case for examination by a forensic scientist, Dr. Greg Hampikian, a Professor in the Department of Biology at Boise State University in Idaho. He is qualified to give evidence as a DNA expert in the United States and also worked in the United Kingdom. In his affidavits he outlines a number of changes in DNA testing since that performed in the late 1990s at a stage when SGM or SGM plus forensic DNA profiling was state of the art. He observed that in this case profiling produced inconclusive results on a number of items. He outlined how newer methods could possibly detect DNA from fewer cells and could specifically amplify male DNA even when in a mixed sample which is overwhelmingly female. These tests are designed to produce results on highly degraded samples such as might be expected in the applicant's case where the body spent time submerged in sea water. He stated that it was not uncommon that newer DNA methods could produce results where standard SGM or SGM plus had been ineffective. In particular, he made three claims set out in his conclusions in an affidavit of January, 2013:-

> "13. ***Fingernail clippings***:
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> Fingernail clippings were taken from the victim and sent to the crime lab. They were unable to get results using SGM or SGM plus testing from the left hand, and the DNA from the right hand yielded only the victim's profile. However, modern DNA testing, specifically Y-STR testing, could now produce a male DNA profile. Before Y-STR testing, finger nail scrapings and clippings taken in sexual assault cases were often not viable for DNA testing because the male DNA (likely in skin cells under the nail) were overwhelmed by the female DNA of the victim. For this reason testing of biological material under the fingernails rarely gave a probative answer until Y-STR testing protocols were developed. Because the victim may well have scratched her attacker during the violent assault that led to her death, a male DNA profile from the victim's fingernail clippings would be critical evidence in determining the identity of her attacker.
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> 14. ***Fibers & Hairs***:
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> If hairs are identified in the evidence that still have roots attached, traditional STR – DNA testing can be performed on the hair to obtain a DNA profile. If, however, the hairs are merely fragments without roots, the hairs will have to be subjected to mitochondrial DNA testing.
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> 15. ***Clothing Items (victims trousers, panties, bra)***:
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> Several items of clothing that belonged to the victim and may have been handled by the perpetrator could provide useable DNA profiles and should be tested. Specifically, her trousers and bra were in a state of disarray, and her panties appear to have been placed back on the body. Now "touch DNA" profiles could likely be obtained through testing of the clothing items. Because of their clear link to the violent attack, those results would be highly probative. The crotch of the panties and trousers could also have epithelial cells from the perpetrator transferred either through contact, or drainage from the victim's vagina.
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> 16. To summarise, it is my opinion that DNA testing on the blood, clothing, fingernail clippings and other items can produce meaningful results e.g. clearly inculpating or excluding Mr. John McDonagh as the perpetrator. Methods such as

mini STR-DNA testing, LCN DNA analysis, mitochondrial DNA testing and Y Chromosome STR testing can effectively extract and identify DNA profiles from the (a) fingernail scrapings from the deceased; (b) four swabs from a condom; (c) the victim's underwear (panties); (d) the victim's bra; (e) the victim's trousers; and the (f) fibres recovered from the applicant's clothing. The resulting profiles can be compared to determine whether this biological evidence was deposited by Mr. John McDonagh or another person. They can also be compared to one another to determine whether the various biological samples were deposited by one person or not.

17. When there are weaknesses in the evidence and inconclusive analysis as there are in this case, it is my expert opinion that modern DNA testing must be performed on probative biological evidence that can justify or exclude a perpetrator.

18. Were JMD to be definitively excluded as the originator of the biological materials, this would provide strong exculpatory evidence."

12. Dr. Duncan Woods, a forensic biologist with Keith Borer Consultants, furnished an affidavit dated 24th February, 2014. He previously furnished an affidavit on behalf of the applicant for the purpose of his appeal against conviction. The applicant was refused leave by the court to adduce the further evidence set out in that affidavit in relation to the fibres found on the deceased's clothing which was presented to the jury at the applicant's trial.

13. It is accepted by Dr. Woods that Dr. Hampikian's statements concerning the advanced method of DNA profiling are accurate. However, he states that LCN (low copy number) DNA profiling is no longer in use in the UK as it was a product of the UK Forensic Science Service, which has now closed. Other methods of DNA analysis referred to by Professor Hampikian were not provided by Keith Borer Consultants or by the Forensic Science Laboratory in Dublin, both of which employ conventional DNA profiling techniques using enhanced extraction methods. He was aware that other forensic science laboratories in the United Kingdom facilitate mitochondrial DNA and Y-STR techniques, though he was unsure how much of the actual testing was carried out in the United Kingdom. He accepted that both methods were provided by Cellmark Forensic Services in England and at least one other provider of mitochondrial DNA testing, LGC Limited of Teddington, which has sent samples to Pennsylvania for analysis. He addressed the three matters raised by Professor Hampikian's affidavit.

Fingernail Clippings:
Dr. Woods believed that the fingernail clippings could now be subjected to Y-STR analysis. However, he stated that in isolation any results obtained at this stage from the fingernail clippings would have questionable evidential value, but it remained "possible" that such results "could be significant if they formed part of a broader forensic picture, that is, if similar DNA profiles were obtained from other forensic evidence such as the deceased's clothing or underwear".

Analysis of Clothing Items:
Dr. Woods is satisfied that the techniques referred to by Professor Hampikian were available in the United Kingdom and Ireland. He considered that the chances of successful analysis appeared to be low even assuming proper storage of the items so that there has been no contamination of them. He acknowledged that if an unknown male DNA profile was obtained in more than one location or sample from the deceased's clothing, underwear or fingernail clippings, then that could provide evidence of intimate contact with the deceased. He states that "in order to maintain the applicant's conviction, the court would have to accept that he was the last person to have contact with the deceased and that he did so without leaving his own DNA profile, while some previous contact with another male had transferred detectable levels of DNA to several locations, that had then persisted through the subsequent conditions to which the clothing and Ms. Hynes had been subjected".

He considered that the use of modern and/or novel DNA analysis techniques were unlikely to yield anything of probative value if only applied to limited samples in the case. The evidence would only be significant if consistent matching results were found across a range of samples, thereby increasing the likelihood of that DNA having been deposited by the last person to have contact with the deceased.

Fibre Evidence:
Dr. Woods considered that the significance of the fibre evidence had been thoroughly considered and in the absence of any hairs on the deceased or her clothing which appear foreign to her, hair analysis would be of academic interest only. In addition, loose hairs are easily transferred in many innocent circumstances and consequently, the identification of foreign hairs would have questionable evidential value save insofar as they mirror DNA evidence obtained from another sample or location.

14. Dr. Woods was also concerned that if further testing were carried out, it would have to be done on the basis of what is the most appropriate and not just the most readily available methods. This was particularly important as there might only be sufficient DNA to carry out one analysis of each sample.

15. Dr. Louise McKenna was the forensic scientist retained to examine items of evidence in the course of the investigation in this case and provided an affidavit sworn 10th June, 2013. She addressed each of the matters advanced by Dr. Hampikian:-

Fingernail Clippings:
Dr. McKenna stated that the nail clippings were tested in a reputable DNA testing laboratory, Cellmark, though no conclusive result could be obtained. She was not at the time of the swearing of the affidavit aware of whether anything remained of the clippings (though it emerged in the course of the hearing that some of the clippings were still in existence). She noted that even if they were available and even if male DNA were found thereon, the issue would be whether the foreign DNA had transferred from the killer or as a result of an innocent encounter. She noted one recent study which demonstrated that 19% of the general population had foreign DNA under their fingernails. Dr. Hampikian in a further affidavit stated that there were more pertinent studies of post conviction cases. Testing indicated that of 194 post conviction DNA exonerations in the United States, 5% "included DNA evidence from fingernails".

Fibres and Hairs:
Dr. McKenna noted that no hairs were found on the victim's body or clothes which were visually different from the victim's own hair. She considered that Dr. Hampikian's affidavit in describing other physical evidence as "only subject to visual and/or microscopic inspection" overlooked the extensive testing carried out on numerous fibres recovered which resulted in a report of "very strong support for the proposition that Siobhan Hayes was in contact with John McDonagh's jumper and strong support for the proposition that she was in (his) car…", which was unsuccessfully challenged at the applicant's trial. Dr. Hampikian states that in a number of cases visual hair comparisons had been corrected by DNA analysis which is

recognised as superior to more rudimentary visual comparisons. He considered that the hairs could be unambiguously attributed to the victim, the applicant or some other person by standard DNA analysis. If they had a root they could be subjected to standard STR testing. If they lacked a root they could be analysed by mitochondrial DNA analysis.

Clothing Items:
Dr. McKenna noted that the victim's clothing had been immersed in water and covered in sand by the time of the discovery of her body. This greatly reduced the chances of any successful DNA analysis. The underwear (panties) which was found in the lane was soaking wet and mud stained. It was taped for fibre examination involving repeated applications of sellotape which removed surface cellular debris which further reduced the chance of successful DNA analysis. A condom discovered by the gardaí was disintegrating which may indicate that it was in the lane for some time. In reply, Dr. Hampikian states that modern tests are able to detect even just a few molecules of DNA.

16. Dr. McKenna stated that Dr. Hampikian's arguments centre on a possibility of generating profiles that may be irrelevant or misleading. She stated that:-

> "In the light of the actual evidence of this case I do not consider that further DNA testing on these items would be likely to yield profile evidence."

17. It is not at all clear from Dr. Hampikian's affidavits and the other affidavits submitted, whether the tests and science upon which he now relies came into existence or became more widely used in forensic analysis in criminal matters between 1999 and 2007, or after 2007. If available prior to 2007, they ought to have been part of the review carried out by Dr. Woods, an expert in the field, and would likely have been recommended by him if they were thought to be relevant to this case. There was no evidence as to the extent or state of preservation of items which it is proposed to test. This highlights an unsatisfactory aspect of this application. The court has not been furnished with all of the forensic reports which were compiled at the time of the investigation or in respect of the appeal. It has not been furnished with the transcript of the trial. It has not been furnished with the written submissions made in respect of the appeal. No evidence has been advanced by Dr. Woods as to the nature and extent, if any, of the consideration which he gave to the DNA issues on behalf of the defence at the time of the appeal, or the nature and extent of the forensic reports sought or obtained in that regard, at the time of the trial. This emphasises the entirely unsatisfactory nature of bringing an application such as this by way of judicial review. The court is faced with a very redacted view of what transpired pre-trial, at trial and on appeal relevant to this matter. It is incumbent upon the applicant to set out clearly the issues relating to DNA that were considered by the forensic scientists involved in the case on behalf of the defence and to demonstrate clearly which of the matters referred to by Dr. Hampikian were entirely new, not considered, or could not possibly have been considered at the time of the trial or the appeal. I am somewhat surprised that Dr. Woods affidavit is not directed to these matters given his historical involvement in the case. He was in a position to clearly demonstrate the shortcomings of his opinion caused by the absence and non-availability to him of the testing methods now suggested by Dr. Hampikian. There is no affidavit from Ms. Elaine King, a forensic expert, who was engaged by the applicant's solicitors at the time of the initial trial in 2001. It is imperative in an application of this kind that the forensic scientists involved in the initial trial, if still available, as Dr. Woods clearly is, offer some evidence of the strictures under which they now consider themselves to have been operating by reason of subsequent scientific developments, not least because their evidence will be anchored in the reality of the case.

18. The affidavits of the three experts concentrate on issues relating to DNA. They do not materially effect certain facts established at the trial. It remains the case that fibre evidence which was regarded as an important part of the prosecution case establishes that there was very strong support for the proposition that the applicant's jumper had been in contact with the deceased's clothing and was supportive of the proposition that the deceased had been in the applicant's car. The applicant denied to Gardai that he had been wearing the jumper on which the fibres were found. He denied that the deceased had been in his car. Dr Hampikian claims no expertise on fibres. The fact remains that the applicant changed his top, had scratches on his body and a mark on his left hand the day after the killing and gave the Gardai the wrong jumper when asked for the jumper he wore on the night. Dr McKenna suggests that the fibre evidence is simply ignored by Dr Hampikian. Dr Woods, the applicant's forensic scientist, now considers that the fibre evidence was thoroughly considered. He also considered that the absence of any hairs on the deceased or her clothing which appeared foreign to her rendered hair analysis of academic interest only.

19. There is no suggestion or evidence that any other person was identified as a potential culprit in the course of the investigation and the suggestion that another person was involved other than the applicant is, on the evidence available to the court, purely speculative. Dr Woods emphasised that an isolated result from the fingernail clipping test at this stage was of questionable evidential value. He believed that it had a possible significance if it formed part of a broader forensic picture obtained from the examination of other items. Its relevance, if any, depended on similar DNA profiles being obtained from other items of evidence. The evidence would only be significant if similar profiles were obtained from a range of samples. Dr McKenna considered that the chances of obtaining samples of DNA from the victims clothing was greatly reduced by its immersion in water and soil. She did not consider that further DNA testing of the items would likely yield profile evidence. Dr Hampikian has a different view and seems to rate more highly the prospect of obtaining profiles from the items requested. He is essentially advocating a reinvestigation of the items using a new scientific test on the basis of a possibility that a similar profile may be obtained from one or more of the items. It is also clear that the experts disagree on the significance of a finding of a third party DNA profile under the fingernail or in hair samples. Each of the witnesses relies on differing degrees of possibility of discovering a DNA profile on one or more of the items and the inferences that may perhaps be drawn from such findings. This ranges from what appears to the court to be a high level of possibility on the part of Dr.Hampikian to lower levels on the part of Dr. Woods and Dr. Mc Kenna which at times reflects a mere possibility on their part and scepticism about the value of retesting on the part of Dr, Mc Kenna.

20. For the reasons which follow I am not satisfied that an application for *mandamus* or declaratory relief is appropriate in this case. The court considers that the applicant has a remedy under s. 2 of the Criminal Procedure Act 1993. I therefore do not consider it appropriate to determine whether on the evidence the court considers that a sufficient evidential basis has been established to direct the test requested. That is a matter for the Court of Appeal to consider on the basis of much more extensive evidence and applying a different (and perhaps a much less onerous) test to that applicable to the granting of relief sought by way of judicial review.

Public Policy
21. The respondent submits that the applicant's conviction and the rejection of his appeal by the Court of Criminal Appeal should be taken into account by any Court considering the merits of this application. I am satisfied that the fact that he was convicted and that his appeal was rejected frames the limitation of his continued legal entitlement to challenge his conviction.

22. There is an extensive pre-trial obligation of disclosure in criminal trials. The prosecution must disclose to the defence all relevant evidence which is in its possession. It must disclose evidence which it does not intend to use at trial "if that evidence could be considered as relevant or could assist the defence" (see, *The People (DPP) v. Michael McKevitt* [2005] IECCA 139). The information

that must be disclosed is that which is relevant or possibly relevant to an issue in the case, raises or possibly raises a new issue the existence of which is not apparent from the evidence which the prosecution proposes to rely upon, and is such that it holds out a real prospect of an avenue of enquiry relevant to issues arising in the case or from other disclosure (see *R v. Keane* [1994] 1 W.L.R. 746).

23. The disclosure rules are subject to or limited by claims arising on the basis of privilege or public policy.

24. No claim was made in this case that trial disclosure by the prosecution was incomplete or that access to any items of real evidence discovered in the course of the investigation or used in the course of the trial was not given to the applicant, his legal advisors or any forensic scientific expert retained to examine same.

25. This application concerns the release of materials to a convicted person after a trial and appeal and not to an accused in advance of trial. It seeks the re-examination of items of real evidence which were subjected to inconclusive DNA testing at trial which was not relied upon in evidence by either side. The carrying out of the proposed new tests on the basis that there is a possibility that some other male may be identified as a possible culprit in the s. 4 rape and murder for which the applicant was convicted is advanced as a sufficient reason to order that access be given to the items of evidence.

26. The respondents submit that a decision to grant access to items of real evidence for testing and this application must be governed by the recognition that a trial in accordance with law has taken place, and a wide ranging appeal with access to further forensic advice and investigation has been rejected by the Court of Criminal Appeal. It is also submitted that the presumption of innocence has been rebutted in that the applicant has been convicted and must be presumed guilty. While it is recognised that there is a public interest in the identification and correction of flaws in the trial process leading to the detection of an unsafe conviction, it is said that there is a countervailing public interest in the finality of proceedings for those concerned including witnesses, and relatives of the deceased who have a legitimate interest in knowing that the legal process has been concluded.

27. Furthermore, it is submitted that the applicant has failed to explain the extensive delay which arose in seeking the relevant re-examination and has not fully and clearly explained when the alleged new tests became available, or demonstrated that he acted in a timely fashion in seeking re-examination.

28. The application also raises issues concerning the preservation of items of evidence. The court was informed during the course of the hearing, that some nail clippings were preserved and remained available. However, there may be issues concerning the fragility of the nail clipping or any material that might be found upon it or indeed any of the items to which reference has been made. Furthermore, no evidence was put before the court concerning the potential loss or deterioration of any of the items which it was proposed to examine during the course or as a result of fresh testing. This may have implications for the conduct of any trial in the future which scientific experts would need to address. At the very least this information would have to be available to the court for the formulation of any appropriate order if such were granted.

29. On the other hand the court must give due weight to the principle that a person who is innocent should have an effective remedy where by he may establish that fact.

30. These issues have been considered in other common law jurisdictions.

United Kingdom.

31. In *R. (Nunn) v. Chief Constable of Suffolk Constabulary* [2004] UKSC 37: [2014] 3 W.L.R. 77, the applicant was convicted of murder and rape in 2006, and appealed unsuccessfully. He continued to protest his innocence and made various applications to the police for their records of the investigation. He requested that material be made available for DNA testing and re-testing. He claimed that his solicitors and scientific experts would undertake a full re-investigation of the case to determine what lines of enquiry might provide material to support a reference to a Criminal Case Review Commission (CCRC), with a view to further challenging his conviction. The police accepted that they were obliged to disclose any material which came to light after his conviction which might cast doubt on its safety, but rejected his request. On an application for judicial review seeking a declaration that the police refusal to grant access was unlawful and a mandatory order requiring access to be given, the applicant claimed that the common law duty of disclosure remained in force before and after trial and that the Crown's disclosure obligation following his conviction remained the same.

32. Following conviction and appeal, a convicted person in the United Kingdom may apply to the Criminal Cases Review Commission (CCRC) which is vested with power to review any conviction. If the CCRC thinks that there is a real possibility that the Court of Appeal might quash the conviction, it may refer the case back to that court on any grounds, whether previously argued or not on the basis that the applicant's case is arguable. The Court of Appeal has a duty to investigate the safety of the conviction and must quash it if it is unsafe. The CCRC has extensive investigative powers, including the power to require the production to it of any material in the hands of the police or any other public body, to appoint an investigator with all the powers of a police officer and to assemble fresh evidence not before the court of trial. In *Nunn*, the United Kingdom Supreme Court noted the role of the CCRC as an independent body which was skilled in examining the details of evidence and determining when and if there is a real prospect of material emerging which affects the safety of a conviction. If there was, it had an obligation to make inquiries in a case, not only when a reasonable prospect of quashing the conviction had been demonstrated, but "in appropriate cases to see whether such a prospect can be shown, and it has ample power to direct a newly available scientific test to be undertaken". However, the Supreme Court also stated that the CCRC must refrain from indulging in the consideration of merely speculative matters. Its important role is outlined by Lord Hughes J.S.C.:-

> "39. The safety net in the case of disputed requests for review lies in the CCRC. That body does not, and should not, make inquiries only when a reasonable prospect of a conviction being quashed is already demonstrated. It can and does in appropriate cases make inquiry to see whether such prospect can be shown. It has ample power, for example, to direct that a newly available scientific test be undertaken…what it ought not to do is to indulge the merely speculative. It is an independent body specifically skilled in examining the details of evidence and in determining when and if there is a real prospect of material emerging which affects the safety of a conviction. This exercise involves a detailed scrutiny of the other evidence in the case and a judgment on the likely impact of whatever it is suggested the fresh inquiries may generate. Whilst in principle the court retains control, *via* the remedy of judicial review, of the duty laid on the police and prosecutors after the appeal process is exhausted, it is likely to determine, unless good reason for not doing so is provided, that relief by that route is inappropriate until the CCRC has had the opportunity to make a reasoned decision."

33. The United Kingdom Supreme Court having rejected the proposition that the duty of disclosure remained the same after conviction as before, then addressed the duty which remained post conviction and appeal.

34. The court noted that the CCRC had ample power to direct that available scientific tests be undertaken (*R. v. Shirley* [2003] EWCA Crim 1976 and *R. v. Hodgson* [2009] EWCA Crim 490).

35. The appellant in Nunn claimed that the right to disclosure and inspection of items of real evidence which applied at the trial and appeal stages at common law and pursuant to statute, also applied at the post-appeal stage. This was dealt with in the United Kingdom by the Attorney General's Guidelines concerning the disclosure of material affecting the safety of a conviction, which stated:-

> "Post Conviction
>
> 72. Where, after the conclusion of proceedings, material comes to light, that might cast doubt on the safety of the conviction, the prosecutor must consider disclosure of such material."

36. The court interpreted the guideline as meaning that the prosecution must not only consider the disclosure of such material, but must make disclosure unless there is good reason not to. The court rejected the submission that this imposed a duty to give active consideration continuously to the state of evidence, or that there was a duty to respond from time to time to any request for information or for access to material made by the convict. The court was not satisfied that a convict who asserts that his conviction was wrong is, or ever was entitled to the same duty of disclosure or inspection for an indefinite period after conviction. It noted that the common law developed the duty of disclosure as an incident of the trial process to ensure fairness of procedures. It was not a means of investigating alleged miscarriages of justice after a proper trial process had been completed and was not devised to equip convicted persons with continuing rights to indefinite re-investigation of their cases. The court accepted the propositions, also advanced by the respondents in this case, that post appeal the convict is presumed guilty, not innocent, unless and until it can be demonstrated "not necessarily that he is innocent, but that his conviction is unsafe". It accepted the important public interest that any flaw in a conviction which renders it unsafe must be exposed, but also acknowledged the powerful public interest in finality of proceedings. It also noted that an indefinite wide ranging obligation imposed on the prosecution could be very onerous with enormous implications for the allocation of resources. There was a clear public interest that in the contest for finite resources, current police investigations should be prioritised over the reinvestigation of concluded cases, unless "good reason is established". Therefore, the court rejected the submission that the duty of disclosure remained the same after conviction as before. Lord Hughes J.S.C. stated:-

> "35. There can be no doubt that if the police or prosecution come into possession, after the appellate process is exhausted, of something new which might afford arguable grounds for contending that the conviction was unsafe, it is their duty to disclose it to the convicted defendant. Simple examples might include a new (and credible) confession by someone else, or the discovery, incidentally to a different investigation, of a pattern, or of evidence, which throws doubt on the original conviction. Sometimes such material may appear unexpectedly and adventitiously; in other cases it may be the result of a reopening by the police of the inquiry. In either case, the new material is likely to be unknown to the convicted defendant unless disclosed to him. In all such cases there is a clear obligation to disclose it. Paragraph 72 of the Attorney General's Guidelines, quoted above, correctly recognises this. This is, however, plainly different from an obligation not to reveal something new, but to afford renewed access to something disclosed at a time of trial, or to undertake further inquiries at the request of the convicted defendant."

37. Having acknowledged that in *R. v. Hodgson* [2009] EWCA Crim. 490, a defendant's conviction for rape and murder based on compelling detail of his own circumstantial confessions, was 27 years later demonstrated to have been wrong by the advances of science and, in particular, the application of newly developed DNA tests to forensic samples, the court stated that it did not necessarily follow from such cases that the law ought to impose a general duty on police forces holding archived investigation material to respond to every request for further inquiry by those disputing their convictions. It stated:-

> "38. …if the duty of disclosure pending appeal is limited, as it plainly is, to material which can be demonstrated to be relevant to the safety of the conviction, it is all the clearer that after the appellate rights which the system affords are exhausted the existing obligation cannot be greater than that stated in the Attorney General's Guidelines,…"

38. The court accepted that advances in science mean that from time to time it will become possible to undertake tests which were not available earlier. It accepted that sometimes such tests would determine the issue of guilt (as in *Hodgson*). However, in other cases "they will be simply speculative, either because there is great uncertainty about whether any result can be obtained or because any result will be consistent with both guilt and innocence". The court noted that:-

> "The police and prosecutors ought to exercise sensible judgment when representations of this kind are made on behalf of convicted persons. If there appears to be a real prospect that further inquiry will uncover something which may affect the safety of the conviction, then there should be cooperation in making it. It is in nobody's interests to resist all inquiry unless and until the CCRC directs it."

39. In this case, An Garda Síochána stated that it could not offer the facility of access to the material without a court order. I am not satisfied that it is necessary in every case that this Court or the Court of Appeal should be asked to intervene. There are clearly cases in which An Garda Síochána or the Director of Public Prosecutions may initiate forensic testing on the basis of new science which may lead to the identification of a new culprit or the initiation of a prosecution in a "cold case", or the consideration of a further prosecution of a person who has been acquitted by direction. In addition, it would appear to be contrary to the interests of justice that if the Director of Public Prosecutions considered that the application of a new forensic test might exonerate a convicted person, she could not take steps in ensure such a test was carried out by An Garda Síochána or the Forensic Science Laboratory.

40. There will be cases in which An Garda Síochána and solicitors on behalf of a convicted person may agree that it is appropriate that new testing techniques ought to be applied to items of real evidence. In the United Kingdom, the Supreme Court clearly encouraged cooperation in such testing when deemed necessary in order to determine whether the matter should be referred to the CCRC. Nevertheless, there will be cases in which a dispute may arise between the convict and the prosecuting authorities as to the nature and extent of the obligation to carry out a requested test. The United Kingdom Supreme Court determined the matter in the following way:-

> "42. It is enough to determine the instant appeal that after conviction there is no indefinitely continuing duty on the police or prosecutor either in the same form as existed pre-trials, or to respond to whatever inquiries the defendant may make for access to the case materials to allow reinvestigation. The duty is properly stated at paragraph 72 of the Attorney General's Guidelines read as explained…with the addition that if there exists a real prospect that further inquiry may reveal something affecting the safety of the conviction, that inquiry ought to be made."

The court noted that in the case of some of the testing proposed it was likely that some alteration of the samples might be involved and that further testing may not be conclusive. It stated that:-

> "If this kind of operation is in question, there is a further decision to be made whether retesting would rule out any future use of the material. There may be a separate question concerning the new possibilities of undertaking modern, and better, DNA testing of certain swabs…even there, however, the forensic science report now relied upon concludes that even if a match were found to one of the men under discussion in the case, that would not necessarily exclude the claimant as the killer. The killer may or may not have deposited traceable DNA. Although it is suggested for the claimant that if DNA attributable to one of these men were to be found, that would provide good evidence that he *might* be the killer, it must also be the case that any DNA which is found need not be related to the killing, particularly if the deceased had an association with the man in question…"

The court concluded that on the limited information available, it remained unclear that a "real prospect is established of material emerging affecting the safety of the conviction". It added, however, that any further request for access to the sample should be assessed in the first instance by the police and if necessary by the CCRC by applying the test of whether there was a real prospect that further inquiry may reveal something affecting the safety of the conviction.

41. I am satisfied that An Garda Síochána, if necessary, in consultation with the office of the Director of Public Prosecutions, should consider any application for access to items of evidence for the purpose of applying newly discovered scientific tests, on its merits. There is no equivalent to the CCRC in this jurisdiction but there will undoubtedly be cases which it may be deemed appropriate by the Commissioner to cooperate with a defence solicitor in facilitating such a test; such cooperation is to be encouraged where appropriate. I am also satisfied that the principles outlined in the Nunn case are similar to those which apply as a matter of fair procedures in this jurisdiction under Articles 38 and 40.3 of the Constitution to the testing of items of evidence post-conviction and/or appeal.

Canada

42. These issues were also considered by the Court of Appeal of Ontario in *Trotta v. The Queen* [2004] 23 CR(6) 261. The competing interests identified by the United Kingdom Supreme Court and, indeed, by the Court of Criminal Appeal in this jurisdiction between public interest in finality and the protection of those who may be innocent post conviction and appeal were considered by the court. The appellant, in a pending appeal, sought an order requiring the Crown to produce material in its possession. The appellant was the co-accused in a trial for the murder of his son and sought production of material to assist in efforts to gather fresh evidence to challenge the competence and objectivity of a pathologist, which had not been attacked in the course of the trial.

43. The court accepted that the Crown's disclosure obligations continued through the appellate process as the protection of the innocent was as important on appeal as prior to conviction. However, the resolution of disclosure disputes on appeal required a somewhat different analytical framework, because the presumption of innocence no longer applied or the right to make full answer and defence. Nevertheless, the court recognised that the broad rights on appeal, including the right to receive fresh evidence and the courts wide remedial powers, were all calculated to maximise protection against wrongful convictions. The Crown's obligation extended on appeal to any information in the possession of the Crown which gave rise to "a reasonable possibility (that it) may assist the accused in the prosecution of his or her appeal". In order to succeed on the application for the production of the materials sought, the court stated that:-

> "25. …the applicant must show that there is a reasonable possibility that the material sought could assist on the motion to adduce fresh evidence. By assist, I mean yield material that will be admissible as fresh evidence, or assist the applicant in developing or obtaining material that will be admissible as fresh evidence. The applicant must demonstrate that there is some reasonable possibility that the evidence to which the production request is linked may be received as fresh evidence on appeal. Unless the appellant can make both links, there is no reasonable possibility that the material sought could assist in the prosecution of the appeal and consequently, no reason for this Court to require the Crown to disclose it."

The court was satisfied that the applicant had demonstrated a link between the material he sought and the evidence that would challenge the paediatric pathologist's competence and objectivity when testifying for the prosecution. He had shown that the material sought could provide evidence going to either or both of these issues, or at least could provide material that would assist in generating evidence that would be relevant to the pathologist's professional competence and his objectivity. However, the court was not satisfied that there was a reasonable possibility that the evidence could be admitted in the interests of justice. To be admissible, the applicant had to show that the evidence could reasonably be expected to affect the verdict, but evidence which was not sufficiently cogent to give cause for concern over the verdict served no purpose at the appellate stage. Having reviewed the transcript of the pathologist's evidence at trial, the court concluded that no attempt had been made to challenge his medical opinion concerning his conclusions as to the cause of death. Insofar as his evidence was challenged, and on the basis of the grounds of appeal advanced, the court concluded that the resolution of the issues arising in the case did not depend on the pathologist's challenged competence in other cases and, in particular, there was no evidence to suggest that any of his opinions were open to legitimate debate in the case under appeal. The application for production of the material was refused.

44. It was noted by Lord Hughes in *Nunn*, that the decision in *Trotta* was a good illustration of the difference in the application of disclosure rules at the pre-trial and appellate stages. At the pre-trial stage, material affecting the pathologist and his standing would have been disclosable since it would not have been known whether there was any challenge to his findings, whereas at the appeal stage it was clear no such challenge had been made. The *Trotta* case is also noteworthy for its emphasis on the importance of the link between the possibility of generating new evidence using a new test thereby procuring an expert opinion and the requirement that the opinion be of a sufficiently cogent and relevant nature such that it might have affected the verdict in the case.

The United States

45. The extent to which the convict is entitled to access an item of real evidence post conviction and appeal was also considered by the United States Supreme Court in *District Attorney's Office for the Third District -v- Osborne* 557 US 1. Osborne was convicted of kidnapping, assault and sexual assault. He claimed a right to access materials in order to subject them to Short-Tandem Repeat (STR) testing (as in this case), a more discriminating test, than that available at the time of his trial. At his trial his attorney declined to seek further testing, having concluded that further testing would do more harm than good. A defence was mounted of mistaken identity on the basis that the imprecision of the test that was applied gave the attorney "very good numbers in a mistaken identity, cross-relation identification case, where the victim was in the dark and had bad eyesight". She concluded that a more advanced DNA test would serve to prove that Osborne committed the alleged crimes. The Alaskan Court of Appeals concluded that the attorney's decision had been strategic and rejected the appellants argument that his representation was constitutionally ineffective because a further more advanced test was not sought on his behalf.

46. Osborne sought the DNA testing that his attorney had failed to seek under an Alaskan post conviction statute. The Alaska Court of Appeals concluded that he had no right to the testing which at the time of the appeal was the "RFLP" test (pre the STR test). The court concluded that this test had been available at trial and it was not likely to be conclusive. It also relied on the fact that Osborne had confessed to his crimes in a 2004 application for parole and subsequently repeated this confession before a parole board.

47. Osborne claimed that under the due process clause of the 14th Amendment to the United States Constitution he had a constitutional right to access the STR test at his own expense. The difficultly raised by technological and scientific advances in DNA testing post conviction was recognised by Roberts CJ:-

> "… the availability of technology not available at trial cannot mean that every criminal conviction, or even every criminal conviction involving biological evidence is suddenly in doubt. The dilemma is how to harness DNA's power to prove innocence without unnecessarily overthrowing the established system of criminal justice" (p. 8).

48. The Federal Government enacted the Innocence Protection Act 2004 which allows prisoners to move for court ordered DNA testing under specified conditions. Many states have enacted statutes which adopted the Federal statute as their model.

49. Alaska did not enact such a statute but it was accepted by the Supreme Court that access was available to a prisoner under Alaskan law who wished to subject items of real evidence to newly available DNA testing in order to establish his/her innocence. Roberts CJ summarized the position as follows:-

> "First, access to evidence is available under Alaskan law for those who seek to subject it to newly available DNA testing that will prove them to be actually innocent. Under the States general post-conviction relief statute, a prisoner may challenge his conviction when "there exists evidence of material facts, not previously presented and heard by the Court, that requires vacation of the conviction or sentence in the interest of justice". Alaska Stat.12.72.010(4) [2008]. Such a claim is exempt from otherwise applicable time limits if "newly discovered evidence" pursued with due diligence, "establishes by clear and convincing evidence that the applicant is innocent". 12.72.020(v)(2).
>
> Both parties agree that under these provisions … "a defendant is entitled to post conviction relief if the defendant presents newly discovered evidence that establishes by clear and convincing evidence that the defendant is innocent". Osborne 1 … If such a claim is brought, state law permits general discovery. See Alaska rule Crim. Proc. 35.1(g). Alaska courts have explained that these procedures are available to request DNA evidence for newly available testing to establish actual innocence…"

50. Furthermore, the Alaska Court of Appeals under the state constitution had adopted a test to govern additional rights to DNA access. Where a conviction rested upon eye-witness identification and there was a demonstrable doubt concerning the defendant's identification as the perpetrator, and that scientific testing would likely be conclusive on the issue of identification, access to post-DNA testing was permitted. Thus even those who are not entitled to discovery under the state's criminal rules have available to them "a safety valve under the state constitution".

51. The Supreme Court in rejecting the appellant's claim to a right to further DNA testing post-conviction under the due process clause stated:-

> "We see nothing inadequate about the procedures that Alaska has provided to vindicate its state right to post-conviction relief in general and nothing inadequate about how those procedures apply to those that seek access to DNA evidence. Alaska provides a substantive right to be released on a sufficiently compelling showing of new evidence that establishes innocence. It exempts such claims from otherwise applicable time limits. The state provides for discovery in post-conviction proceedings, and has, through judicial decision – specified that this discovery procedure is available to those seeking access to DNA evidence. … These procedures are not without limits. The evidence must indeed be newly available to qualify under Alaska statute, must have been diligently pursued, and must also be sufficiently material. These procedures are similar to those provided for DNA evidence by federal law and the law of other States... and they are not inconsistent with the "judicious conscience of our people" or with any recognised principle of fundamental fairness"." (page 16).

52. It is clear that considerable efforts have been made in other common law jurisdictions to enable convicted persons who maintain their innocence post-conviction or appeal to avail of newly developed or discovered DNA testing processes if there is sufficiently cogent evidence advanced in support of its use and potential relevance in demonstrating the convict's innocence or that he has been the subject of a miscarriage of justice. I am satisfied that the same principles considered in the cases discussed above apply in this jurisdiction and underpin the provisions of the Criminal Procedure Act 1993 and the interpretation of the nature and scope of the jurisdiction concerning alleged miscarriages of justice by the Court of Criminal Appeal and the Supreme Court to which I know turn.

Section 2 of the Criminal Procedure Act 1993

53. The applicant maintains his innocence of these offences. Under s. 2 of the Criminal Procedure Act 1993, he has a limited right to apply to the Court of Appeal for an order quashing his conviction if he:-

> "(b) …alleges that a new or newly discovered fact shows that there has been a miscarriage of justice in relation to the conviction…"

This application is treated for all purposes as an appeal to the court against conviction.

54. A "new" fact is defined by subs (3) as:-

> "…a fact known to the convicted person at the time of the trial or appeal proceedings the significance of which was appreciated by him, where he alleges that there is a reasonable explanation for his failure to adduce evidence of that fact."

A "newly discovered fact" is defined under subs (4) as:-

> "a fact discovered by or coming to the notice of the convicted person after the relevant appeal proceedings have been finally determined or a fact the significance of which was not appreciated by the convicted person or his advisers during the trial or appeal proceedings."

55. The jurisdiction of the Court of Appeal on such an application is defined by s. 3 and includes provision for the carrying out of further inquiries or the calling of additional evidence. Section 3(3) provides that the court, on the hearing of an appeal…may:-

> "(a) where the appeal is based on new or additional evidence, direct the Commissioner of An Garda Síochána to have such inquiries carried out as the court considers necessary or expedient for the purpose of determining whether further evidence ought to be adduced;
>
> (b) order the production of any document, exhibit or other thing connected with the proceedings;
>
> (c) order any person who would have been a compellable witness in the proceeding from which the appeal lies to attend for examination and be examined before the court, whether or not he was called in those proceedings;
>
> (d) receive the evidence, if tendered, of any witness;
>
> (e) generally make such order as may be necessary for the purpose of doing justice in the case before the court."

The more usual procedures for the taking of evidence are augmented in subs (4) under which the court is vested with the power to order the examination of any witness whose attendance might be required under s. 3 to be conducted, in a manner provided by Rules of Court, before any judge or officer of the court or other person appointed by the court for that purpose, and may allow the admission of any depositions taken in this manner as evidence before the court.

56. It is clear that the purpose of the legislation is to empower the court to ensure that justice is done on any such application. It is rooted in the principle that a convicted person who wishes to assert his innocent on the basis of new evidence should not be precluded from doing so. It is axiomatic that the court will make any order to assist in the procurement of evidence if it can be established that such an order is necessary to achieve that purpose and that there is a reasonable prospect that such evidence would be admissible as a new or newly discovered fact.

57. Under s. 5(1) if it appears to the registrar of the Court of Appeal that an application under s. 2 does not disclose a *prima facie* case that a miscarriage of justice has occurred in respect of the conviction, he/she may without calling for the report of the official stenographer, refer this application to the court for summary determination. The court may "if its considers that the application is frivolous or vexatious and can be determined without adjourning it for a full hearing, dismiss it summarily, without calling on anyone to attend the hearing or to appear on behalf of the prosecution". The applicant fears that if a s. 2 application were to be moved prior to the carrying out of the test and obtaining an expert report on its results, it would be certain to fail at this initial hurdle.

58. In *The People (DPP) v. Kelly* [2008] 3 I.R. 697, during the preparation of an application under s. 2(1) which had been submitted to the court, the applicant's solicitors received from the Chief Prosecution Solicitor a booklet of photographs taken during the post mortem examination of the victim that had not been disclosed to the defence at the time of trial. A further expert report was produced based on a forensic analysis of the photographs relating to bruising on the neck of the deceased. The court heard and considered additional evidence from pathologists on behalf of the applicant and the Director of Public Prosecutions, and the transcript of the cross examination of the state pathologist at the trial. It concluded that this evidence would have been of little assistance to the applicant at the trial, in particular, having regard to the other evidence in the case, including his confession. In that case, the court noted that there were no new facts or science such as might invalidate any previous opinion tendered at the trial.

59. The Director of Public Prosecutions submitted that the procedure under s. 2 did not introduce an automatic right to a hearing under the section merely because an expert report could be produced contradicting the prosecution expert at the original trial; such an application might constitute no more than an attempt to introduce a fresh expert who might do a better job than the original defence expert. Alternatively, it was submitted that an applicant might seek to introduce a mixture of old and new science and/or old and new grounds of appeal in such a way that a limited piece of "new science" could be used as a trigger for the complete rehearing of numerous other issues.

60. The Court of Criminal Appeal expressed the "strong view" that opinion evidence should not ordinarily constitute a newly discovered fact within the terms of the Act for a number of reasons. Firstly, to so interpret opinion evidence would be to give a meaning to the word "fact" which was different from its ordinary and natural meaning. Secondly, it would have the effect of rendering virtually every conviction, even one upheld on appeal, open to later challenge if a further or new expert could be found to offer an opinion going further than a defence expert had done at trial or which tended to contradict or undermine experts called on behalf of the prosecution at trial. It would open the door to the introduction of additional evidence in circumstances which the court stated were "plainly contra-indicated" by the court in *The People (DPP) v. Willoughby* [2005] IECCA 4 in which the court stated at pp. 21 and 22:-

> "(a) Given that the public interest requires that a defendant bring forward his entire case at trial, exceptional circumstances must be established before the court should allow further evidence to be called. That onus is particularly heavy in the case of expert testimony, having regard to the availability generally of expertise from multiple sources.
>
> (b) The evidence must not have been known at the time of the trial and must be such that it could not reasonably have been known or acquired at the time of the trial.
>
> (c) It must be evidence which is credible and which might have a material and important influence on the result of the case.
>
> (d) The assessment of credibility or materiality must be conducted by reference to the other evidence at the trial and not in isolation."

61. In *Kelly* this statement was qualified in this way:-

> "44. That is not to say that opinion evidence is in all circumstances inadmissible, as the court's present ruling will make clear. There may be cases where (the) state of scientific knowledge as of the date of trial may be invalidated or thrown into significant uncertainty by newly developed science. There may also be cases where the opinion of an expert at trial may later be shown to have been tainted by dishonesty, incompetence or bias to such a degree as to render his evidence worthless or unreliable. Once such "facts" are established, expert opinion evidence must clearly then be admissible so that such new "facts" can be properly interpreted."

62. The criteria which the Court of Appeal must apply in assessing and evaluating evidence in a s. 2 appeal was considered by the court:-

> "90. This question has already been determined by the Supreme Court in the *People (Director of Public Prosecutions) v. Gannon* [1997] 1 I.R. 40. The judgment of Blayney J. delivered in that case makes it clear that the test is not to inquire whether the new material rendered the conviction of the appellant unsafe and unsatisfactory having regard to the course *actually* taken by the defence at trial but rather to ascertain whether the defence could have used the material in such a way as to raise a doubt about a significant element in the prosecution case and the possibility that a different approach by the defence might have led to an acquittal. In the course of his judgment, Blayney J. stated as follows at pp. 47 – 48:-
>
> > 'The court could not conclude for certain that the advent of the newly discovered material would have no effect on the manner in which the defence was conducted. The furthest one could go would be to say that it is possible that it might not have had any effect and this would not relieve the court from examining what the position would have been if the defence had availed of the newly discovered material and altered its strategy accordingly.'
>
> 91. Thus, what the court is required to do is to carry out an objective evaluation of the newly discovered fact with a view to determining in the light of it whether the applicant's conviction was unsafe and unsatisfactory in the context of the what the legal advisers might have done with the material if it had been available to them. The court cannot simply have regard only to the course actually taken by the defence at trial.
>
> 92. The court must therefore evaluate the evidence in relation to the newly discovered fact, firstly to ascertain if the evidence establishes the newly discovered fact, secondly to assess the weight and credibility of such evidence by reference to an objective standard to determine whether defence counsel could have utilised the newly discovered material in such a way as to raise a reasonable doubt in the minds of the jury about a significant element in the prosecution case."

The test for directing that an item of real evidence be made available post-conviction and appeal, must address whether the result would assist in generating evidence relevant to the identification of another person as a culprit or the asserted innocence of the applicant, and also whether the evidence ultimately produced may be received as additional evidence as a "newly discovered fact" under s. 2.

63. In order to advance such an application, the applicant must furnish to the court a proof or statement of the evidence which each new witness is to give together with an explanation by the witness for his failure to give such evidence at the trial (see *Attorney General v. McGann* [1927] IR503). In this case any proposed fresh evidence would be that of an expert witness on the basis of a report compiled following the application of further tests to items to which access is sought. In considering such an application it is appropriate to take into account whether such additional evidence "is credible and …. might have a material and important influence over the result of the case". However, it must be borne in mind that, as stated by the Court of Criminal Appeal in Kelly, expert evidence is only admissible as a newly discovered fact when the state of scientific knowledge as of the date of the trial is invalidated or thrown into significant uncertainty by newly developed science.

Is Section 2 applicable?

64. This application is brought because, it is claimed, that the s. 2 procedure does not provide for a situation in which a new scientific test has been developed which, if applied, may yield relevant evidence which exculpates or tends to exculpate a convict in respect of the offences of which he was convicted. The applicant's solicitors requested and were refused access to items of real evidence for the purpose of carrying out what is claimed to be a more advanced scientific test unavailable at the time of the original trial, conviction or appeal. The applicant is, therefore, not in a position to obtain an expert opinion to determine whether such relevant evidence is now available: one cannot determine the results of any such test until it is carried out. It is submitted, therefore, that it would be inappropriate and legally impermissible to advance an application under s. 2, because it must be based on a "newly discovered fact" in existence at the initiating stage. In this case an expert opinion could only be obtained following the application of a test based on new science and the furnishing of an expert report favourable to the applicant.

65. I am not satisfied that this is so. In *The People (Director of Public Prosecutions) v. Pringle (No.2)* [1997] 2 I.R. 225, Lynch J. reviewed the jurisdiction of the court then exercised by the Court of Criminal Appeal and stated at p. 240:-

> "A person who has been convicted of an offence on indictment and who has unsuccessfully appealed to the Court of Criminal Appeal has merely to allege subsequently in a further notice of application to that court that a new or newly discovered fact shows that there has been a miscarriage of justice whereupon he comes within the terms of s. 2 of the Act of 1993, and becomes entitled to apply for an order quashing the conviction. This is a very simple mechanism to comply with and therefore to avoid abuse, s. 5 provides for the summary dismissal of such an application if the court considers it frivolous or vexatious on a referral to it by the registrar of the court, he being of the view that the application does not disclose a *prima facie* case that a miscarriage of justice has occurred in relation to the conviction. That did not arise in this case and therefore all that the applicant had to do was to lodge a notice of application to the Court of Criminal Appeal alleging that a new or newly discovered fact shows that there has been a miscarriage of justice in his case and he thereby automatically fulfilled the conditions required by s. 2 to bring his case for review by the Court of Criminal Appeal. By virtue of subsection (2) of s. 2, the application is to be treated for all purposes as an appeal to the court against the conviction of November, 1980. It follows that at that stage of the application there is no requirement to show an actual miscarriage of justice. Any defect or error in the trial such as would render the convictions unsafe and unsatisfactory is sufficient to lead to a quashing of the convictions and this of course reflects the first basic aim of the Act of 1993, as set out in the long title."

66. The Court of Criminal Appeal is vested with extensive powers at the hearing of an appeal to direct such inquiries as it considers necessary or expedient for the purpose of determining whether further evidence ought to be adduced where the appeal is based on new or additional evidence, to order the production of any exhibit connected with the proceedings and "generally make such orders as may be necessary for the purpose of doing justice in the case before the court" (emphasises added). The subsection envisages a wide range of pre-hearing applications. No decided cases under s. 2(3) concerning the ambit of that jurisdiction have been cited. It appears to me that the Court of Appeal has ample jurisdiction to entertain a motion directing the Commissioner of An Garda Síochána to make items of real evidence available for forensic testing upon such terms and conditions considered to be appropriate and in the interests of justice. As indicated by Lynch J. in the *Pringle* case, the appeal process is a matter of "simple mechanics" pursuant to which the applicant initiates the application which may give rise to the exercise of the court's jurisdiction under s. 3. It may be that before the substantive grounds of such an application are perfected, it will be necessary in the unusual circumstances presented by

scientific developments and the invention of new or more accurate tests to ensure, as a matter of fairness, that an opportunity be given to an applicant to carry out such tests. It is difficult to see, having regard to the wording and purpose of the section that in the exceptional case of newly discovered science, the court would not consider such an application for the purpose of doing justice in a particular case. An appellate courts power to grant such relief is now well recognised as an important tool in delivering justice in such cases (see *Kelly, Nunn, Trotta and Osborne*).

67. In civil cases, of course, pre-trial discovery, and inspection procedures have been developed for the proper pleading and proof of cases. Pre-trial discovery, may, in exceptional circumstances be granted, where there is evidence of a clear wrong perpetrated against a plaintiff but the identities of the wrongdoers are known to a third party (*EMI Records (Ireland) Limited v. Eircom Limited* [2005] 4 I.R. 148). Discovery may also be granted prior to the delivery of a statement of claim, in exceptional circumstances, if such is required to prepare it properly. In *Law Society of Ireland v. Rawlinson* [1997] 3 I.R. 592, Morris J. (as he then was) granted discovery to the plaintiff in a negligence suit against a firm of accountants because according to its investigating accountants, access was required to prepare the statement of claim properly. Though the plaintiff was already in possession of sufficient information to enable it to prepare and deliver a statement of claim reflecting the basic ingredients of the case, it was desirable that the pleadings should be sufficiently concise and clear to enable the defendants to know the case which they had to meet. The case was complex. The plaintiff had a statutory duty to make good a solicitor's alleged default from the Law Society's compensation fund. A stateable case existed which was capable of being pleaded in general terms, but which could be more concisely pleaded if discovery were granted. Morris J. (as he then was) accepted that such discovery may be granted in exceptional circumstances if the interests of justice so require. However, the learned judge, was also satisfied that "trawling" or "fishing" was not permitted.

68. Thus, in *McGrory v. ESB* [2003] 2 I.R. 407, the Supreme Court accepted that the right of the defendant in an action where the plaintiff claims damages for personal injuries to have the plaintiff medically examined, to have access to his medical records and to interview his treating doctors, was not dependent on the closure of the pleadings. Keane C.J. stated that a medical examination could be sought at any stage and "it is indeed not unknown for potential defendants to seek such an examination before any proceedings are actually instituted". Once they had been instituted, the examination and full access to the plaintiff's records and interviews with his medical advisers were of assistance in enabling the defendants to form a view as to the amount of damages which the plaintiff is likely to recover. Discovery in such cases was not dependent on the closing of the pleadings and would assist in the calculation of any lodgement that might be made. Early discovery may also be required in medical negligence suits.

69. The issues involved in a s. 2 application are of equal if not greater importance to the applicant than those in which common law rules have been devised in civil cases as a matter of fair procedures. It appears to me that it was open to the applicant in this case to initiate a s. 2 application in the Court of Appeal and to apply by way of preliminary motion based on a full and extensive affidavit seeking an order directing that any relevant items of real evidence which were sought for forensic examination on the basis of a newly developed scientific test be made available for that purpose.

70. The application under s. 2 and a preliminary motion in the form discussed has a number of advantages. The entire history of the case will be available to the Court of Appeal. It will have full and ready access to all relevant papers, transcripts and items of real evidence together with any submissions made in the course of previous applications to the court of trial or the Court of Criminal Appeal. The Court of Appeal will have a more complete understanding of the circumstances and facts of the case, the evidence adduced and the nature and relevance of any new material sought to be advanced or any new test to be applied. Any application will be rooted in the reality of the evidence in the case to date and the defence previously advanced, in a much more concise and focused way than is possible on an application for judicial review. The maintenance and preservation of proposed exhibits or items of evidence will continue to be subject to the directions of a court exercising criminal jurisdiction which is an essential feature of the ordered continuity and integrity of criminal proceedings in the future. In contrast this court has been furnished with very limited material in relation to the conduct of the trial or the appeal. It seems to me that the more appropriate forum for seeking relief in respect of this matter is the Court of Appeal exercising its criminal jurisdiction under s. 2.

71. This conclusion is entirely consistent with other developments in criminal practice and procedure concerning the use of new science in the investigation and prosecution of offences. Under s. 8 of the Criminal Procedure Act 2010, the Director of Public Prosecutions may in respect of a person who has been tried on indictment but acquitted whether at the trial, or on appeal against conviction, apply to the court for a re-trial order where it appears to the Director that there is "new and compelling evidence" against that person in relation to the relevant offence, and that it is in the public interest to do so. There is little doubt that such new and compelling evidence may be based on new scientific discoveries which enable more advanced forensic analysis of items of real evidence. In the case of a "cold case" review such scientific advances may provide investigators with the breakthrough they need in identifying a culprit or exculpating a suspect. Scientific advances have also resulted in the exoneration of persons wrongfully accused. Of course, if new scientific discoveries are to have any practical application, the tests that are necessary must be carried out on the relevant items of real evidence, if still available. These will most probably be in the custody of An Garda Síochána. Thus, in a cold case review or for the purpose of a s. 8 consideration, items of real evidence are available to the prosecuting authority and investigators for testing at any time.

Conclusions

72. A convicted person is not entitled to the presumption of innocence following conviction and sentence and a failed appeal. However, it is a fundamental principle of the administration of criminal justice that if new evidence based upon a new or newly discovered fact establishes that a convicted person is innocent of the offence of which he/she was convicted the conviction should be quashed. An application to do so must be made under the provisions of s. 2 and s. 3 of the Criminal Procedure Act 1993.

73. A new scientific discovery which results in the development of a forensic test not previously available at the time of trial and/or appeal may, if later applied to items of real evidence relevant to the investigation of and/or the identification of the convicted person as the culprit in the offence of which he/she was convicted, invalidate or throw into significant uncertainty the conclusions reached on the basis of the state of scientific knowledge at that time.

74. If an expert opinion is obtained on the application of new scientific knowledge or a newly developed scientific test an application may then be made to the Court of Appeal to seek to have the expert opinion treated as a "newly discovered fact".

75. If the new expert opinion is to be admitted in evidence the applicant must demonstrate that it was unknown at the time of trial or appeal or could not reasonably have been known or acquired at that time.

76. The new evidence must be credible and be such that it might have a material effect on the result of the case and in establishing that there has been a miscarriage of justice.

77. The onus is on the applicant to establish that the new expert opinion constitutes a new or newly discovered fact. An opinion that

simply goes further than an expert opinion available at the trial or one which tends to contradict or undermine an expert called on behalf of the prosecution will not be sufficient and the assessment of the potential credibility or materiality of the new expert opinion must be conducted by reference to the other evidence at the trial and not in isolation.

78. When an application is submitted to the Court of Appeal on the basis that there has been a miscarriage of justice the court may "generally make such orders as may be necessary for the purpose of doing justice in the case before the court". The potential effect of new scientific discoveries and tests has already been recognized in other common law jurisdictions and by the Court of Criminal Appeal. The court has ample jurisdiction to consider whether in an application initiated under s. 2 it is necessary for the purpose of doing justice to direct that items procured in the course of an investigation or relied upon in evidence, be subjected to a newly developed scientific test. However, that does not mean that a court application is required in every such case.

79. If, as a result of new scientific knowledge and/or the development of a new scientific test, it is sought to carry out forensic test(s) on item(s) of real evidence relevant to the investigation and trial for the purpose of obtaining an expert's opinion which may be relied upon in an application under s. 2 of the Act, application to do so should first be made to the Commissioner of An Garda Síochána for access to the items for that purpose.

80. An Garda Síochána and the Director of Public Prosecutions share a duty to disclose to a convicted person and/or his legal representatives the discovery of any new evidence that he/she is innocent of the offence of which he/she was convicted including any new forensic evidence to that effect. It follows that situations may arise in which the Commissioner, the Director and the defence may agree that a new test should be applied because of its demonstrated relevance and potential significance and effect in a particular case.

81. This is also consistent with the use of new science in the continuing investigation of "cold cases" which may lead to the identification of culprits many years after the commission of a crime and the power now vested in the Director of Public Prosecutions to apply for a re-trial order in respect of a person who has been acquitted where there is "new and compelling" evidence under s. 8 of the Criminal Procedure Act 2010.

82. There is no legal requirement on the Commissioner or the Director to apply for a court order permitting access to such items for the purpose of testing: nor is an order required to enable the Commissioner to grant such access to an expert on behalf of a convicted person if that is thought to be appropriate in the circumstances.

83. An application by a convicted person to the Commissioner for access to items gathered in the course of the investigation or used as evidence in the course of the trial following conviction or appeal should be granted if it might reasonably be anticipated that the use of the test might yield a result and there is a reasonable prospect that the result and an opinion based upon it will be received as "newly discovered" evidence on an application under s. 2 of the 1993 Act. The overriding consideration is whether it is necessary for the purpose of doing justice that access be granted, a purpose which involves a shared responsibility between An Garda Síochána, the Director of Public Prosecutions and lawyers representing convicted persons.

84. There is no absolute obligation on the Commissioner to facilitate the re-investigation of offences following a conviction or a failed appeal. The preservation of exhibits or material gathered in the course of an investigation following the conclusion of a criminal investigation and criminal proceedings is not regulated by statute. Following a reasonable request by solicitors acting on behalf of the convict, the Commissioner should determine whether the items sought have been preserved, lost or perished over the years since the conviction and inform the solicitors accordingly. The Commissioner, if the material exists, should then consider the application for access. It may be that access will be granted or granted on terms as to supervision, joint examination or otherwise or refused for good reason. If refused adequate reasons should be given. These may be furnished in relatively short form sufficient to indicate that the merits of the request have been considered on the application of the appropriate test and outline briefly the basis for any conclusion.

85. An application should be refused if it is merely speculative. The Commissioner because of the wide knowledge, experience and skill of An Garda Síochána in the investigation of crime and of the particular offence should be given a wide margin of appreciation in respect of a refusal on any application for judicial review of a refusal.

86. The Commissioner's decision is subject to judicial review. However, an application for judicial review of a refusal of access by the Commissioner may only be granted if the applicant establishes a fundamental flaw in the decision-making process and may otherwise only succeed in most exceptional circumstances if based on alleged unreasonableness or irrationality.

87. If the Commissioner refuses access to relevant items for the purpose of applying a newly developed test, the convicted person may, in the course of an application under s. 2 of the Criminal Procedure Act 1993, apply to the Court of Appeal for an order directing that access be granted upon such terms and conditions as are deemed necessary for the purpose of doing justice in the case. An application may be initiated under s. 2 seeking to quash the conviction and sentence and at the same time a motion may be filed seeking an order under s. 3 outlining the entire background and circumstances of the application.

88. The court considers that such an application is unsuitable to the limited jurisdiction available by way of judicial review. The Court of Appeal has full jurisdiction to make such orders as are necessary in an application under the 1993 Act for the purpose of doing justice and, in doing so, to examine all aspects of the case to date. To that end, it may direct further evidence and the production of anything connected with the proceedings or that access be granted to any item for further testing.

89. This court is limited, on this application, to a consideration of the evidence produced on affidavit and the examination of the decision-making process which led to the refusal of access. It has no jurisdiction to determine the merits of that decision or to substitute its own view as to whether the application should have been granted.

90. The court is also satisfied that this is not a suitable case in which to invoke the jurisdiction of the High Court to grant the relief sought in order to vindicate a claimed right to fair procedures or equality of arms under Article 40.3 of the Constitution since there is a remedy under s. 2: even if the remedy sought were available the limited nature of the evidence contained in the affidavits submitted does not justify such intervention.

91. An applicant for an order directing that access be granted by the Commissioner to relevant items for the purpose of carrying out a newly discovered test under s. 3 must establish that such items of evidence still exist. If they still exist their state of preservation should also be established and that the test is capable of being carried out to the extent required to yield a reliable result upon which to base a conclusion relevant to the issue. This may depend upon the state of preservation or the amount of material or the size of the sample necessary to carry out the test or other factors. The potential destruction or alteration of the nature of the items in the

course of testing must also be considered and whether specific directions are required in that regard to ensure fairness to both parties, the integrity of the s. 2 application and any future trial in which reliance might be placed upon the test and any resulting conclusions.

92. The onus on the applicant seeking such an order is a high one and the order should not be granted on a speculative basis. The convicted person is not entitled to a re-investigation of the case or to access to items for the purpose of testing on the basis of mere assertions. He/she must demonstrate by reference to the entire facts of the case that it might reasonably be anticipated that the test might yield a result and that there is a reasonable prospect that the result and an opinion based upon it might be received as a "newly discovered fact" such as to establish a miscarriage of justice within the meaning of s. 2.

Decision

93. I am satisfied that the Court of Appeal has jurisdiction to determine whether the relief sought in this case ought to be granted in the course of an application initiated under s. 2 of the Criminal Procedure Act 1993. The Assistant Commissioner made a decision that he could not accede to the request made for access in the absence of a court order. Though it was stated that "much consideration" was given to the application it is not clear that any consideration was given to its merits. I consider that the Commissioner is entitled to grant access to materials, items of evidence gathered in the course of a criminal investigation or exhibited in the criminal trial for scientific examination if that is thought to be appropriate within the terms of the legal test set out above in the light of new scientific discoveries. In that sense, the decision of the Commissioner was flawed. However, the applicant does not seek an order of *certiorari* in relation to the Commissioner's decision or a declaration concerning a failure to address the application on its merits or because no adequate reasons are given for its refusal. Nevertheless, it seems to me that it is still open to the Commissioner to consider the matter on its merits. It is also open to the applicant having been refused access to initiate an application to the Court of Appeal under s. 2 seeking an order granting access to the items on the basis of the new science and the new forensic test for the reasons set out above.

94. Therefore, I am not satisfied that the applicant has established that he is entitled to an order of mandamus or an order directing the granting of access to items of evidence as requested or any of the declarations sought. Furthermore, I am not satisfied that the applicant has established any basis upon which to claim any relief under the provisions of the European Convention on Human Rights Act 2003 or the provisions of the European Convention on Human Rights.

95. This application is therefore refused.