Neutral Citation Number: [2007] IEHC 123

THE HIGH COURT

JUDICIAL REVIEW

[2005 No. 556 J.R.]

BETWEEN

KEVIN MCCORMACK

APPLICANT

AND

THE JUDGE OF THE CIRCUIT COURT AND THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

Judgment of Mr. Justice Charleton delivered on the 17th day of April, 2007

1. On Sunday 4th of July, 2004, Renata Bubeniene drove into the city centre from Lucan and parked her car. As she was walking along Amiens Street, a young man came along and yanked her handbag out of her possession and ran away towards Buckingham Street. She reported the crime to Store Street Garda station and described the culprit. As it happened, the applicant had been seen by Garda Wayne Kelly, some fifteen minute before this incident had occurred, on Amiens Street. The clothing of the applicant matched the description given by the victim. Shortly after the complaint, the applicant was seen by the gardaí and, fitting the relevant description, he was arrested. He was cautioned in accordance with the Judges' Rules and taken to Store Street Garda station. There, he was detained pursuant to s. 4 of the Criminal Justice Act, 1984, and was required to undergo two periods of interviews by gardaí. These were conducted in accordance with the Criminal Justice Act, 1984 (Electronic Recording of Interviews) Regulations 1997. The accused denied the offence. On being charged, he was granted bail and the case was set for trial before the Circuit Criminal Court. The trial has not yet taken place.

2. On 20th June, 2005, Kevin McCormack was given leave by the High Court to commence an application for judicial review. In these proceedings he seeks to restrain the respondents from trying him on the offences with which he is charged. His grounds are that the gardaí failed to properly conduct and make a written record of the interviews they had with him while he was briefly in custody when arrested on this matter; and that his right to a fair trial has been seriously undermined by reason of the failure of the gardaí to preserve all closed circuit television footage taken from security cameras in or around the place where the crime occurred.

3. The Video

The applicant argues that the video evidence of the two Garda interviews with him discloses a "disgraceful situation". In the video recordings, it is claimed, derogatory comments are made about the accused and about his solicitor. The questioning of the gardaí, it was alleged, was littered with profanities. To make matters worse, I was told, one of the gardaí used the time when he should have been concentrating on interviewing the accused to practice playing yo-yo. A legal issue also emerged. It was said that an accused person on arrest has an entitlement to be given a chance to make his case; and that the unstructured and chaotic nature of this interview deprived the accused of an opportunity to make on video his answer to the charge of handbag stealing. His case in defence was, his counsel told me, that he was indeed in Amiens Street in or around the relevant time but that, by the time the offence had been committed, he had gone to his granny's house to have dinner; in consequence, he did not commit the offence.

4. It might be regarded as unusual for an accused, even in the form of an applicant for judicial review before the High Court, to claim that the gardaí should give him an opportunity to present his defence. The rule in criminal cases is that the accused, subject to some very limited exceptions, is not obliged to make any case in defence of a criminal charge and the prosecution, in general, are not entitled to know what the defence case is unless a statutory exception applies, such as that related to the notification to an alibi. There is a growing practice, however, of persons arrested for crime to use the opportunity of being questioned in Garda custody to deny the offence. Sometimes the statements made will be entirely self-serving but may, nonetheless, subject to the discretion of the trial judge as to the admissibility of confession evidence, be presented as part of the prosecution case. In *The People (D.P.P.) v John Clarke* [1995] 1 I.L.R.M. 355, the trial judge hearing a murder case, had told the jury that a mainly ex-culpatory statement made in Garda custody by the accused, was not evidence as to fact, but merely evidence of what had been said to the gardaí. The Court of Criminal Appeal, relying on *The People (A.G.) v. Crosbie* (1961) 1 Frewen 231, held that a statement of the accused, once put in evidence by the prosecution, is to be treated as evidence of the facts stated. I quote at p. 367:-

> "The true position in law, as established by that case, and which we take this opportunity of reiterating is that once a statement is put in evidence, as in this case by the prosecution, it then and thereby becomes evidence in the real sense of the word, not only against the person who made it but for him as to facts contained in it favourable to his defence, or case. A jury is not bound to accept such favourable facts as true, even if unrefuted by contrary evidence, but they should be told to receive, weigh and consider them as evidence."

5. The Court of Criminal Appeal did not comment adversely or at all on the instruction of the trial judge to the jury in that case that such evidence should be weighed by them bearing in mind that such a statement was not sworn or subject to cross-examination. This is, to my mind, a correct direction. It can perhaps be wrong for the jury to be asked to consider a long series of entirely ex-culpatory statements by the accused. In rape cases, this practice can lead to an imbalance in the proceedings. The rule that statements by an accused person were admissible in evidence was grounded on an exception to the hearsay rule that an admission against interest should be considered by the tribunal of fact. A self-serving statement does not fall within that exception, but the vast majority of cases of this kind, as in *Clarke's* case, are mixed; proving, if accepted, some facts for the prosecution and asserting a defence for the accused. In rape and sexual assault cases, the accused may use the opportunity of every interview to reiterate, for instance, that his encounter with the alleged victim was consensual.

6. Must all of these be repeated in evidence in front of the jury? Where the alleged victim apparently comes at the first opportunity that reasonably presents itself and complains freely that he or she has been raped or sexually assaulted, it is usually only the first complaint that is admitted in evidence; and that solely to show the consistency of the case being made by the complainant. This rule is an exceptional one and it only applies in sexual assault type cases. To allow the repetition of the complaint, under the doctrine of recent complaint, as it is known, would be to infringe the rule against self-corroboration. It is difficult to know how an accused's statement should be subject to any different rule if admitted in evidence. The control of this, in the interests of fairness, must be a matter for the trial judge.

7. In *The People (DPP) v. John Lawless* (Unreported, Court of Criminal Appeal, 29th November 1985), the accused argued, at a time prior to the enactment of the Criminal Justice Act, 1984, (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987, that he had not been brought before a court and charged at the first reasonable opportunity. This occurred, it was argued,

because the gardaí, instead, used the opportunity of having him in custody, upon his arrest in apparent possession of heroin, to put to him the material recovered from the sewer leading from the flat from where he was arrested in order to obtain a reaction; possibly amounting to an admission. McCarthy J., at p. 8 of the judgment rejected an argument that the accused should have been brought before a court, instead of being questioned, and stated as follows:

> "The mere production of an exhibit, indeed of the critical incriminating articles found in or about the premises where the accused was arrested, whilst awaiting arrangements to bring him before a court or a judicial officer is in no way a breach of that duty; it might forcefully be suggested that it would be unfair to the accused not to produce these incriminating articles to him at the earliest possible opportunity."

8. The duty of the gardaí in investigating crime is to act reasonably and practicably so as to attempt to gather together such statements, and items of evidence, as may assist in a true judgment in the case; *Ludlow v. The DPP* [2005] I.E.H.C. 299. In consequence, on arresting a suspect it is fair for the gardaí to put forcefully to the accused such portions of the case as might reasonably suggest suspicion. The accused has a right to silence and evidence of an admission is not admissible unless it is proved by the prosecution to have been a voluntary emanation arising from the choice of the suspect; *Re National Irish Banks Limited* (No. 2) [1999] 3 I.R. 190. The legal burdens cast upon the police in investigating crime are sufficiently well defined. The police are entitled to make rational choices as to whether they put matters to a suspect or as to what matters they put to a suspect. It is not for this Court to determine how the police should go about investigations, apart from laying down general principles for their guidance. This has already been done in the cases cited and I would go no further. I would expressly hold that it is not the purpose of a police interview to enable the accused to make a case on video so that it can be played as part of the prosecution case in front of a jury. The accused has, for that purpose, the option of cross examining witnesses at trial, of calling evidence or of giving evidence himself or herself. Whether an entirely self serving statement by an accused, that is repeated again and again, is admissible as to every repetition as an exception to the rule against self-corroboration, is a matter for the trial judge.

9. When one turns to the video, one also realises that the factual matrix contended for is absent. Firstly, the Garda is not playing with a yo-yo, or even practising yo-yo. What appears is that one of the two gardaí is swinging his arm, to and from his forehead and, then, backwards and forwards along the ground for a short period of the interview while his colleague is attempting to write down the somewhat breathless answers of the accused. At one particular point he may be playing with a piece of rolled up paper. That does not matter. Secondly, the accused is in fact given an opportunity to make a case and does so. The accused tells the gardaí, explicitly, that it is not his style to snatch handbags from ladies; that he has an alibi because he was in his granny's for dinner; and that it does not matter that he was later picked out in an informal identification procedure because he did not commit the crime. All of this may be said in a piecemeal way but, when you put it together, it is all there.

10. Since the time when members of police forces were required, pursuant to the Judges' Rules, to attempt to write down an accused person's answer to an accusation, it has always been complained that this was done through a filter of "Garda prose" or that what was said is not accurately reflected in the written document; people, in general, speaking about seven times faster than they write. Now that tape recordings of interviews are available it has to be expected that interviews recorded on video will be either chaotic, laconic or otherwise reflect the real circumstances of conversation between people who may be under pressure of accusation, of work or of life. That is what these videos, in fact, reflect. I do not regard the language used, with the occasional profanity, as being beyond the norm that one would hear in this city at any time of the day or night. I do not think that saying that "any solicitor will advise a client to remain silent" degrades anyone. Nor do I regard the interview as being unstructured. In fact, it occurs to me that the gardaí were doing a good job of attempting to keep the accused to the point in his answers and of dealing with the material which it was necessary for them to deal with in the course of the interview. So, there was no opportunity lost to the accused supposing he wished to avail of it, and supposing he was entitled to it, and there was no abuse of his rights. Of course, the written note gets only some of what was said. The relevant rule requiring a written note is soon to be changed and, in any event, it was never the law that absolutely everything had to be written down by gardaí conducting an interview.

11. Lost Evidence

The sworn evidence of Garda Wayne Kelly was that he went to every relevant closed circuit television system that might have had a potential view of the handbag snatching incident and recovered the tapes. These were all viewed by himself and his colleagues in a Garda station. The incident was not captured, he has sworn, on any of the cameras.

12. An argument can arise at trial that the failure to preserve relevant evidence may cause a serious risk that a fair trial of the accused may never take place, notwithstanding appropriate rulings and directions to the jury by the trial judge. This is not such a case. If there is an issue as to whether Garda Kelly was telling the truth that he conducted his duties by acting reasonably and practicably to gather and preserve evidence that is matter for the trial judge. It is also a matter that can legitimately be used by the accused in cross examination.

13. In the course of his judgment in *McFarlane v. The DPP* [2006] I.E.S.C. 11 at p. 17 Hardiman J. quoted with approval the following passage from *McGrath* on evidence (Dublin, 2004) at p. 691:-

> "A material object is any object, the existence, appearance or condition of which is relevant to the issues in a case. Common examples would include the alleged murder weapon in a murder case, stolen goods in a prosecution for receiving stolen goods and the product in a products liability case. In general such objects are produced in court for inspection and examination by the Tribunal of Fact. However, where it is not possible or practical to produce the actual object, secondary evidence of it may be adduced. This may take the form of photographs or films of the object or the oral evidence of someone who had seen it."

14. This principle, which I approve, applies expressly to this case. Objects which contain smudges, as opposed to fingerprints, do not have to be preserved for trial. Samples of body tissue or fluids from which it has been impossible to construct a DNA profile need not be preserved. In some cases, prudence might dictate that preservation would be a good idea, in order to lessen arguments founded on the non-production of particular objects. The obligation to act reasonably and practicably in gathering evidence relevant to a criminal prosecution does not extend, however, to the gardaí being obliged to preserve every useless exhibit or every item which has yielded no practical forensic result. Further, the gardaí having examined an object and photographed it, may be entitled to dispose of it; even when it be of assistance to the prosecution. An example of that is found in *Bowes v. DPP* [2003] 2 I.R. 25 where the Supreme Court held that it was not necessary for the gardaí to keep possession of a car in which drugs had been found. In that case, a description of the place where the drugs were concealed could be given, either orally or through a photograph. In this case, potentially in aid of the defence, Garda Kelly might be asked the question as to whether this incident was captured on any closed circuit television camera in the area, and his answer might be of assistance to the defence, or regarded as neutral. It might also show that he had done a professional job in this case. That would be my view, on the evidence before me.

15. Jurisdiction of This Court
This court has no jurisdiction to decide issues of admissibility at trial by way of an application for judicial review. Trial judges, whether in the Central Criminal Court, the Circuit Criminal Court or the District Court have the same responsibility in that regard. Their function is to apply the rules of evidence and to exercise judicial discretion in accordance with the relevant balance which the law requires in particular instances. The High Court has absolutely no function in deciding issues as to the admissibility of evidence, by way of an application for judicial review, in advance of a trial; *Byrne v, Grey* [1988] I.R. 31. This is so even though a discreet legal issue arises as to the validity of a warrant; *Berkley v. Edwards* [1988] I.R. 217. Those issues are to be disposed of in the court of trial. It is different if an issue as to delay causing a serious risk of an unfair trial. Denham J. in *D.P.P. v O'C (P*) [2006] IESC 54 said:-

> "There is no doubt that the trial court has a general and inherent power to protect its process from abuse and that this power includes a power to safeguard an accused person from oppression or prejudice. However, this applies during the course of the trial and does not establish a right to a separate, discrete, preliminary process at the commencement of a trial to inquire into issues of delay. The correct procedure pre-trial is to make an application for leave to seek judicial review. It must be stressed that whether such an application for judicial review is granted or not, and even if such an application results in a refusal to grant an injunction or prohibition, the trial court retains its inherent power to protect its process and to make such orders as are necessary during the course of the trial. This includes orders arising from evidence or issues relating to delay."

16. This case is classically one which might require rulings by the trial judge. It seems to me that there is no case to be made, on the evidence before me, that there is any Garda misconduct, or any lost opportunity or any failure to act fairly. These principles, in any event, are not isolated principles which stand alone as if the purpose of a criminal trial was to examine Garda conduct and not to try the accused. The purpose of a criminal trial is to test whether the prosecution have sufficient admissible evidence to discharge the burden of proof to the requisite standard. Any argument that might be made as to unfairness, or lost opportunity, must be placed squarely within the existing common law principles as to the rules of evidence where, I might add, they can only impact on any question as to admissibility of evidence in the rare cases where an appropriate discretion is vested in a trial judge; and there only in circumstances where the trial judge is bound to take these vague notions into account. The only relevant example is the limited discretion to exclude unfairly obtained evidence.

17. The jurisdiction of the High Court to prohibit a criminal trial should be exercised with great caution. In *D.C. v. DPP* [2005] I.E.S.C. 77, Denham J. stated:

> "However, bearing in mind the duty of the courts to protect the constitutional rights of all persons, in exceptional circumstances the court will intervene and prohibit a trial. In general such a step is not necessary as the trial judge maintains at all times the duty to ensure due process and a fair trial. The basic assumption to apply in relation to all pending trials is that they will be conducted fairly, under the presiding judge. However, in circumstances where there is a real or serious risk of an unfair trial the courts will intervene so that a defendant may not be exposed to the commencement of the process, it being the assumption that should such a trial commence it will be stopped by the direction of the trial judge because of the real or serious risk of an unfair trial… Such a jurisdiction to intervene does not apply where the applicant has minutely parsed and analysed the proposed evidence and sought to identify an area merely of difficulty or complexity. The test for this Court is whether there is a real risk that by reason of the particular circumstances that the applicant could not obtain a fair trial."

18. The burden of proof is on the applicant in asserting that a trial should be prohibited. The applicant must show that there is a real or serious risk that a fair trial has become impossible by reason of an occurrence which precludes a fair trial ever taking place notwithstanding the power, and duty, of the trial judge to make appropriate rulings as to the admissibility of evidence and to give appropriate directions as to the law to be applied in weighing evidence to the jury, or to himself or herself in the District Court or Special Criminal Court; *Z. v. DPP* [1994] 2 I.R. 476 at 506, *Bowes v. DPP* [2003] 2 I.R. 25 at 35. As Hardiman J. explained in *Dunne v. DPP* [2002] 2 I. R. 305, arguments are not to be advanced in judicial review that a risk of an unfair trial has occurred on a "remote, theoretical or fanciful possibility" basis. The duty of the High Court in considering an application for prohibition, or for an injunction in the case of a non-judicial officer, is to consider whether the applicant has discharged the burden of proof in accordance with this test; *Mitchell v. DPP* [2002] 2 I.R. 396.

19. The questions raised in this judicial review are ones correctly to be resolved by the law of evidence. The issues have nothing to do with the supervisory jurisdiction of the High Court.