

**THE HIGH COURT****JUDICIAL REVIEW****2006 No. 375 J.R.****BETWEEN****JUNE TRAYNOR****APPLICANT****AND****HER HONOUR JUDGE CATHERINE DELAHUNT, THE DIRECTOR OF PUBLIC PROSECUTIONS AND THE GARDA SÍOCHÁNA COMPLAINTS BOARD****RESPONDENTS****Judgment delivered by Mr. Justice Bryan McMahon the 31st day of July, 2008****Introduction**

1. The central issue in this case is whether the applicant is entitled to disclosure of certain documents and reports sent by the Garda Síochána Complaints Board ("GCB") to the Director of Public Prosecutions which she claims may assist her in defending herself in a criminal trial. Closely related to this is the issue as to whether the applicant is entitled to discovery of similar documentation held by the GCB relating to the same matter. The applicant also claims this as an entitlement.

2. The background is that on 31st March, 2003, a public order incident occurred at Ballyogan Crescent, Dublin, involving a number of people. The gardaí were called to the disturbance. One of the gardaí, Garda Ian Gillen, called to the scene was involved in an altercation with the applicant's daughter and when the applicant tried to intervene she alleges that she was assaulted by the garda in question. The applicant's daughter was arrested. Subsequently, the applicant made a complaint to the Garda Complaints Board about the conduct of Garda Ian Gillen. The Board investigated the complaint and having held that the complaint was admissible, completed its investigation and sent a "report" to the Director of Public Prosecutions. The Director of Public Prosecutions decided eventually not to prosecute the garda. The Garda Complaints Board stated that having regard to the decision of the Director of Public Prosecutions it too had concluded with the matter.

3. Thereafter, on 29th September, 2003, a day under six months after the incident occurred, and the last day for doing so, Garda Ian Gillen applied for the issuance of summonses against the applicant in which the applicant was to be charged with assault and violent disorder. The prosecution of the applicant proceeded through the District Court. At one stage, the prosecution was struck out but the applicant was recharged and the matter was eventually sent forward to the Dublin Circuit Criminal Court. At the call over of cases in the Circuit Court the applicant sought disclosure, both from the Director of Public Prosecutions and from the Garda Complaints Board, of all material generated from the Complaints Board's investigation of the matter. Both parties resisted all disclosure except the statement of complaint made by the applicant herself to the Board and the findings of the Board itself, both of which were sent to the applicant. On the Director of Public Prosecution's assurance that it was not going to rely on any of the said documentation in its case, the Circuit Court judge refused to make any order of disclosure against either party.

4. The applicant brings these proceedings by way of judicial review, leave having been granted by Peart J. on 27th March, 2006. She seeks various orders quashing the Circuit Court Judge's order and seeks other orders the effect of which would be to oblige the GCB and the Director of Public Prosecutions to disclose the relevant documents to the applicant. If the court is not disposed to grant the applicant such orders, the applicant submits that the court should prohibit further prosecution of the applicant by the Director of Public Prosecutions.

**The Applicant's Claim**

5. The applicant argues that unless she gets the orders for discovery or disclosure there is a real risk that she will not get her constitutional right to a trial in due course of law or to a fair trial. This latter right should supersede any right which the GCB or the Director of Public Prosecutions advance on confidentiality grounds, as well as supporting a decision to quash the Circuit Court Judge's refusal.

6. The second respondent resists the application on the following grounds:-

1. Where, as here, an accused person seeks to have a trial prohibited, he or she bears the onus of satisfying the court that he or she runs a real or serious risk of not getting a fair trial. Furthermore, the onus of proof is on the accused person to establish this (*Z v. Director of Public Prosecutions* [1994] 2 I.R. 476 at p. 506). Moreover, it is not sufficient for a person seeking such a prohibition to baldly assert that by reason of some factor, for example delay, lost evidence or failure to have sight of certain documentation, as here, he or she cannot get a fair trial. In the words of the Supreme Court, the applicant must engage with the evidence in order to demonstrate how the matter complained of creates a real or serious risk of an unfair trial. (*McFarlane v. Director of Public Prosecutions* [2007] 1 I.R. 134 at p. 142 per Hardiman J.) The second respondent submits that the applicant has failed to discharge this onus in the present case.

2. While the applicant couches the application in terms of seeking disclosure of disputed documentation, the second respondent submits that in reality what she is seeking is discovery of material within the possession or procurement of the third named respondent. The second respondent argues that it is well established that discovery against third parties is not available in criminal proceedings. (*The People (Director of Public Prosecutions) v. Sweeney* [2001] 4 I.R. 102; *D.H. v. Groarke* [2002] 3 I.R. 522).

3. While the applicant is clearly entitled in criminal proceedings to disclosure of certain documents from the prosecution, this obligation only applies to relevant material within the possession, power or procurement of the prosecution. The second respondent argues that the material sought by the applicant is not within its possession, power or procurement.

7. The principle arguments advanced on behalf of the third respondent can be briefly summarised as follows:-

1. The Board is not a party to the criminal proceedings and is not subject to any obligation of disclosure in the said criminal proceedings.

2. The Board submits that the applicant is attempting to obtain what is effectively third party discovery from the Board. The applicant, as a party in criminal proceedings, has no legally enforceable right or statutory entitlement to disclosure

from a non-party to those proceedings.

3. The Board pleads that the statements gathered by it during the course of an investigation, and the investigating officer's report, must remain confidential irrespective of the outcome of the Board's investigation. Were such statements to lose the protection of confidentiality in instances where subsequent action was not taken, the policy and public interest rationale underpinning such confidentiality would be completely undermined. The disclosure of documents pertaining to the investigation of the complaint would frustrate the functioning of the Board.

4. Equally, the Board submits that the Director of Public Prosecutions is under a duty not to disclose any documents in its possession (if any) relating to the complaint or the investigation having regard to the public interest in maintaining the Board's obligation of confidentiality.

5. Further, the Board has no knowledge of the relevance or otherwise of the material sought to the applicant's criminal trial. This, it is respectfully submitted, is a matter for the trial judge. If the trial judge decided that the material was not relevant as it was not going to be relied upon by the prosecution (as alleged in para. 26 of the first affidavit of June Traynor, the applicant), then the High Court should not set aside this decision which was not in excess of jurisdiction, biased, unreasonable or irrational.

6. The Board denies that the failure to disclose the documents sought will deprive the applicant of a right to trial in due course of law.

### **The Law**

8. The prosecution has an obligation to disclose all material evidence within its possession, power or procurement even where it does not propose to rely on it at the trial. Carney J. in *Director of Public Prosecutions v. Special Criminal Court* [1999] 1 I.R. 60, (hereinafter "Ward") clearly states this to be the position at p. 71:-

"... the prosecution must disclose any document which could be of assistance to the defence in establishing a defence, in damaging the prosecution case or in providing a lead on evidence that goes to either of these two things."

9. Sometimes the duty to disclose is formulated more broadly: Fennelly J. in *The People (Director of Public Prosecutions) v. Kelly* [2006] 3 I.R. 115 put it in these broad terms:-

"...the prosecution must disclose to the defence any material of possible relevance to the guilt or innocence of the accused."

10. The duty to disclose applies only to relevant or material evidence. I do not propose to delay in analysing these two words, or in assessing whether the latter embraces a broader meaning than the former, as in my mind both are equally capable of covering the evidence at issue in this case. It must be recalled that this evidence relates to the very same incident which is the basis of the prosecution's case here. The Garda Complaints Board investigated a complaint by Ms. June Traynor, who is the accused in the underlying case, against Garda Gillen, who is the prosecuting garda. Further, the incident which brought the accused here into contact with Garda Gillen, was one and the same: the fracas that had occurred on 31st March, 2003, near the accused's home. There can be little doubt in my mind that the evidence before the Garda Complaints Board is captured by both words "relevant" and "material" even if they are not synonymous. Persons who attempt to refute this would have a very heavy onus indeed and in my view it could not be done without examining the documents themselves. It must also be recalled that when the Garda Complaints Board decided to send its findings to the Director of Public Prosecutions it had already determined that the complaint was admissible, being made by a member of the public who was directly effected by or who had witnessed the conduct complained of and which was not frivolous or vexatious (s. 4(3)(a) of the Garda Síochána (Complaints) Act 1986) When a complaint is held to be admissible the Commissioner of An Garda Síochána appoints an investigating officer to investigate the matter further (s. 6) and who ultimately reports to the Garda Complaints Board via the Chief Executive. If the Garda Complaints Board, having considered the investigation officer's report and the Chief Executive's comments and recommendations, is of the opinion that the complaint may constitute an offence it shall refer the matter to the Director of Public Prosecutions.

11. In the present case it is clear that a significant process had been completed before the Director of Public Prosecutions decided not to prosecute Garda Gillen. It is inconceivable that much, if not all, of the material generated by this process is not relevant and material to both the prosecution's case and the defendant's case in the proceedings before the Circuit Court.

12. It does not seem to me to be an adequate excuse for the Director of Public Prosecution's reluctance to disclose such material as was sent to it by the Garda Complaints Board to say that it does not propose to rely on it in its prosecution of the defendant. Reliance is not the test for excusing disclosure. The matter is, in my view, the very kind of matter that would impede the prosecutions case, advance the defendant's case or lead to a new line of inquiry of assistance to the defendant, as set out in Ward. The prosecution has made no attempt to argue that it is not relevant or material in this sense. Perhaps, on seeing the material, the defendant will wish to rely on the evidence therein to cross examine Garda Gillen and to attack his credibility. Why should she be deprived of this opportunity?

13. The main substantive argument advanced by the Director of Public Prosecutions is that it must observe the confidential nature of the material sent to it by the Garda Complaints Board. In circumstances such as the present we may legitimately ask: why? Why should the Director of Public Prosecutions show greater respect to the confidential nature of the documents generated by the Garda Complaints Board than to the defendant's constitutional right to a fair trial? If, which is arguable, some kind of confidentiality attaches to such material when it is in the possession of the Garda Complaints Board, does it remain so classified once it is sent on to the Director of Public Prosecutions? Does some kind of waiver operate in those circumstances? If the Director of Public Prosecutions decided initially as a result of being sent the material to prosecute Garda Gillen would it be obliged to release it to Garda Gillen to enable *him* to defend himself? Would the Director of Public Prosecution's sensitivity in such a case trump the garda's right to a fair trial? Surely not. Why should, the complainant here, Mrs. Traynor be placed in a worse position? Her liberty and her good name are equally at stake.

14. Even at its lowest the material in question might disclose the weakness of the defendant's case, or that there are no other relevant witnesses in a position to give evidence. This in itself might save the defendant expense and effort in fruitless investigations of her own.

15. In *Ward*, O'Flaherty J. stated at p. 82 that the prosecution is generally "...under a duty to make that person available as a witness for the defence and, in general, to make available any statements that he may have given" even if it is not proposed to call the author of the statement involved.

16. The duty on the prosecution to disclose extends to preparatory notes and previous inconsistent statements made by witnesses. Any other rule would breach the equality of arms principle. Similarly, the duty extends to transcripts of previous trials (see Hardiman J., *B.J. v. Director of Public Prosecutions* [2003] 4 I.R. 525). In *The People (Director of Public Prosecutions) v. G.K.* (Unreported, Court of Criminal Appeal, 6th June, 2002), the defendant sought from the prosecution a transcript of the previous trial which application was refused. The Court of Criminal Appeal quashed the conviction. In the course of her judgment Denham J., in rejecting the argument based on inconvenience as being "not relevant" stated at pp. 13 to 14:-

"In a criminal prosecution, when a retrial is ordered, for whatever reason, and a successful prosecution is dependant upon the credibility of one or more of the witnesses for the prosecution, whose evidence is not supported by either forensic or circumstantial evidence, fair procedures require that the accused is furnished with a transcript of the testimony given at the first trial, irrespective of whether or not any inconsistencies in the evidence of witnesses for the prosecution can be demonstrated at the time that the application to be provided with such a transcript is made. Otherwise, the accused is precluded from confronting witnesses for the prosecution with inconsistencies in their evidence which only become manifest during the retrial. This is all the more so when the outcome of the prosecution is to a large extent dependant on whether or not the evidence of an alleged victim is accepted by the jury, or by the court, as the case may be. To withhold a transcript of the evidence given at the first trial from an accused person in such a case is tantamount to denying him/her the opportunity of exposing an unreliable witness for what he/she is, in that, in the absence of a capacity to compare evidence given at successive trials by the same witness (evidence which is hotly contested) the accused is, in effect, limited in his/her capacity to defend himself/herself, which offends all principles of justice, as they are recognised in this jurisdiction."

17. In my view there is no reason why the principle stated by Denham J. should not also apply in the present case. In Abrahamson, Dwyer and Fitzpatrick, *Discovery and Disclosure* (Thompson Round Hall, Dublin, 2007) the learned authors, having quoted Denham J., say at p.238:-

"It is submitted that this principle is not limited to previous trials in which the accused participated but extends to proceedings where witnesses have given previous accounts of events which form part of the proceedings in being."

18. At the end of the day the Director of Public Prosecutions has had sight of documents and reports relating to the incident which gave rise to the prosecution in this case. I have no reason to believe that it does not still have this material in its possession. It is denying the defendant the right to examine and assess the documents which, in my view, would clearly be of assistance to the defendant and possibly be damaging to the prosecution. In refusing to order disclosure the trial judge has not examined these documents, but has relied on the Director of Public Prosecution's assurance that it does not propose to rely on that material at the trial. As I have already said, this is not good enough. I acknowledge that there are clearly cases where the law protects material from disclosure by the prosecution such as legal professional privilege, "without prejudice" privilege and informal privilege. This case, however, does not fall within any of these categories.

19. Although it is pertinent to note that the Director of Public Prosecutions does not assert any privilege in respect of the documents at issue in this case, it is appropriate that I should comment further on public interest privilege. In my view it is not open to him to claim public interest privilege merely because the documents belong to a particular class. The determination of a public interest privilege is entirely a matter for the courts. (*Murphy v. Corporation of Dublin* [1972] I.R. 215. See especially Walsh J. at pp. 233 to 234). Normally this will involve the courts engaging in a balancing of the public interests in disclosing or withholding the documents in question. The public interests here are the detection and prosecution of a crime and the defendant's interest in her constitutional right to a fair trial. In *Breathnach v. Ireland* (No. 3) [1993] 2 I.R. 458, where the accused succeeded in having his conviction quashed, and subsequently brought a civil action and sought discovery of documents relating to communications between the gardai and the Director of Public Prosecutions, Keane J., confirming that the appropriate approach was a balancing exercise as set down in *Murphy v. Corporation of Dublin and Ambiorix Ltd v. Minister for the Environment* (No. 1) [1992] 1 I.R. 277 recognised the special circumstances where the investigation of crime was involved. He stated at p. 472:-

"In civil proceedings, the desirability of preserving confidentiality in the case of communications between members of the executive has been significantly eroded as a factor proper to be taken into account by the courts: see in particular the speech of Lord Keith in *Burmah Oil Co. Ltd v. The Bank of England* [1980] A.C. 1090 and observations of McCarthy J. in *Ambiorix Ltd v. Minister for the Environment* [1992] 1 I.R. 277. However, different considerations would appear to apply to communications between the gardai and the Director of Public Prosecutions, where the public interest in the prevention and prosecution of crime must be given due weight. It would be clearly unacceptable if in every case where a person was acquitted of a criminal charge, he could, by instituting proceedings for wrongful arrest or malicious prosecution, embark on a fishing expedition through all the files of the gardai relating to the case. The circumstances of the particular case must determine, in the light of the constitutional principles to which I have referred, whether an inspection should be undertaken by the court and whether, as a result of that inspection, production of any of the documents should be ordered."

20. If the balancing exercise is what should be undertaken where civil litigants seek disclosure of material accumulated in a failed criminal prosecution, how much more appropriate is it that a similar weighing process should be undertaken in the present case where the applicant's reputation and freedom are at stake and where she is entitled to a fair trial under the Constitution.

21. In *Dodd v. Director of Public Prosecutions* [2007] IEHC 97 McGovern J., in a similar case to that which is before this Court, stated in what may be *obiter*:

"In that context the statement made by Garda Sweeney to the Garda Complaints Board would, in my opinion, have been relevant to the defence and should have been disclosed if available."

22. Garda Sweeney who was the subject of a complaint to the Compensation Board was also the prosecuting garda in that case. The complaint against the garda had been dismissed by the Complaints Board as being vexatious and no application was brought against the Board to compel it to furnish any statements it may have had in its possession. The failure by the prosecution to disclose that it did not have Garda Sweeney's statement to the Board and that Garda Sweeney had not retained a copy, caused such a delay in the proceedings that McGovern J. was willing to find that the respondent was prejudiced in relation to some of the charges.

23. Some reliance is placed by the Director of Public Prosecutions on s. 12 of the Garda Síochána (Complaints) Act 1986 which prohibits certain persons from making unauthorised disclosures of information obtained by them in the exercise of their functions. Section 12(1) reads as follows:-

"A person shall not disclose confidential information obtained by him while performing functions as a member of the Board, a tribunal or the Appeal Board or as a member of the staff of the Board, unless he is duly authorised to do so."

24. I construe that subsection as applying only to persons internally engaged or employed by the Board. It says nothing about the Director of Public Prosecution's obligations when the matter is properly forwarded to it by the Board. The Director of Public Prosecution's obligations are not restricted by the section, in my view, in a case such as that which is before the Court. His obligations are defined in the case law already referred to. That the material came to him from the Garda Complaints Board may have some relevance, but it is only one factor which goes into the scales when the weighing exercise is undertaken by the courts. Moreover, the section refers to "confidential information" only and the case law makes a clear distinction between "confidential information" on the one hand and privileged information on the other, the latter, when it applies, being an absolute right (*Fyffes plc. v. D.C.C. plc.* [2005] 1 I.R. 59. See Fennelly J. at 67. The distinction is helpfully noted in Abrahamson, Dwyer, Fitzpatrick, *Discovery and Disclosure*, at pp. 338 to 339) while the former being merely a factor which the courts will take into account when balancing the interests (*Science Research Council v. Nassé* [1980] A.C. 1028, Lord Wilberforce at 1065) More recently still in *O'Callaghan v. Mahon* [2006] 2 I.R. 32, Hardiman J. put the matter in these words at p.71:-

"...one must first look closely at the precise scope and nature of the claim to confidentiality advanced, and determine whether the disputed material is indeed confidential. One must then consider whether such degree of confidentiality as may be found to exist is or is not outweighed by the public interest, based fundamentally on constitutional considerations, in according fair procedures to the applicant in the circumstances in which they are claimed."

25. Similarly in the same way that public interest privilege can apparently be outweighed on occasion (see *Hannigan v. Director of Public Prosecutions* [2001] 1 I.R. 378) one may legitimately ask the question whether the Garda Complaints Board, in forwarding papers relating to Mrs. Traynor's complaint against Garda Gillen, has relinquished its confidentiality claim. Can it now attempt to recall the material if the Director of Public Prosecutions has an obligation to disclose the documentation in the interest of the respondent getting a fair trial? I think not.

26. In his oral submission, the Director of Public Prosecutions argued that the matter of disclosure is a matter for the trial judge primarily. I agree to this extent: it is for the trial judge to examine the particular documents and engage in the weighing exercise to ensure that the accused gets a fair trial. The trial judge has not done so in this case, contenting herself with the Director of Public Prosecution's assurance that it does not intend to rely on these documents. For that reason alone the accused is entitled to an order of this Court. In *P.G. v. Director of Public Prosecutions* [2006] IESC 19 Fennelly J. states:-

"If the matter is not resolved in this way, it will be a matter for the trial judge to deal with it. Presumably the complainant can be asked about it in his evidence. The trial judge must be and is in law bound to arrange the progress of the trial so as to render justice and to guarantee fair procedures to all parties, especially the accused. I agree with the submission of the Respondent that matters of disclosure are within the province of the trial judge. They are not matters for judicial review except to the extent that an accused person can show that, having taken all reasonable steps to obtain disclosure, necessary material is being withheld from him to such an extent as to give rise to a real risk of an unfair trial."

27. In this case, where the documents and reports in question relate to the very same incident, where the main parties involved in the prosecution are the same as those involved in the Board's investigation and the Director of Public Prosecution's previous consideration, it is inconceivable that they would not fall within the principle enunciated in *Ward*, and for this reason; the onus on the accused/applicant to show relevance and that there is a real risk of a fair trial, is easily discharged.

28. In these circumstances I grant the applicant the following reliefs:

(i) an order reversing the order of the first respondent;

(ii) an order, if the Director of Public Prosecutions continues with the prosecution, that the applicant be furnished by the Director of Public Prosecutions with all documents received by it from the Garda Síochána Complaints Board in respect of the complaint made by the accused, Ms June Taylor, against the Gardaí, arising out of an incident that occurred on the 31st March, 2003.

29. I am satisfied that these orders meet the justice of the case and for this reason I make no order against the third defendant.