Neutral Citation Number: [2007] IEHC 366

THE HIGH COURT

JUDICIAL REVIEW

[2005 No.648 JR]

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BETWEEN

RONAN BYRNE AND LIAM MCKENNA

APPLICANTS

AND

THE JUDGES OF THE CIRCUIT COURT AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT of Mr. Justice Hedigan delivered on 31st day of October, 2007

Background Facts

This is an application for leave to seek an order by way of declaration, prohibition or injunction restraining the first and second named applicants' criminal trial The first named applicant herein faced trial before Trim Circuit Court in respect of a charge of possession of stolen property under s. 18 of the Criminal Justice (Theft and Fraud Offences) Act 2001, namely a trailer and a Volvo mini-digger bearing serial numbers 28111610, together valued at €30,000. The second named applicant faced a charge contrary to s. 17 of the same Act of handling stolen goods.

The offences arose out of the same incidents and are alleged to have occurred at Julianstown in Co. Meath on 7th July, 2004. On that date a trailer and mini-digger were hired out by their owner, David Hutchinson of C.P. Hire at Rosemount Business Park in the City of Dublin to a Thomas Power. The trailer and mini-digger were subsequently reported stolen that afternoon and gardaí received information that a known person had stolen a mini-digger and that it was being driven from Dublin in the direction of Julianstown, Co. Meath. Gardaí from Blanchardstown Detective Unit set up surveillance on the roadway. They observed a white vehicle with a yellow light on the roof towing a yellow Volvo mini digger and silver trailer. On entering Julianstown, the yellow mini-digger being towed by a large Volkswagen Transporter entered the car park of the Old Mill Hotel. Subsequently a black Toyota Landcruiser arrived in the car park and joined the occupants of the Volkswagen Transporter. It is alleged that the first named applicant was in the front passenger seat of the Volkswagen van and that the driver of the second vehicle was the second named applicant. According to the statement of Garda John Hyland, two males, now known to be the first named applicant and another man, were seen getting out of the Volkswagen van and inspecting the mini-digger on the back of the trailer. The sole occupant of the Toyota, the second named applicant got out of his vehicle and went over to where the Volkswagen van was parked. Gardaí observed the three men standing around the mini digger and inspecting it. They observed that the three men spoke with each other and after a short period the gardaí arrested the three persons they had been observing which included both applicants. Both applicants were brought to Blanchardstown Garda Station, detained and interviewed and released on bail. In the course of his detention the second named applicant made a number of admissions as to the offence charged. These are not in issue in this judicial review proceeding. The first named applicant denied having any knowledge that the mini-digger was stolen.

The first appearance of the applicants at Drogheda District Court was on 22 July, 2004. Thereafter a number of adjournments occurred and on the 3rd September 2004, on hearing an outline of the evidence including reference to the value of the property, the District Court judge refused jurisdiction on the basis that it was not a minor offence fit to be tried summarily and adjourned the matter further to 15th October, 2004 for service of the Book of Evidence.

The following series of events then took place:

27 September, 2004 – The applicants' solicitor wrote the first of a series of letters to the gardaí investigating the offence, namely Detective Garda John Hyland, Detective Garda Martin Flood and Detective Garda Edward Carroll seeking confirmation that the mini-digger and trailer, the subject matter of the proceedings, were being preserved for inspection and requested an opportunity to examine same. No reply was received in relation to this letter.

15 October, 2004 – The applicants appeared before Drogheda District Court. The matter was struck out by the District Court judge when no Book of Evidence was ready.

26 January, 2005 – the applicants' solicitor wrote to Detective Garda Hyland at Blanchardstown Garda station referring to his letter of the 27 September asking again for confirmation that the trailer and mini-digger were preserved and requested again to carry out an independent examination

28 January, 2005 – The applicants were re served with the aforesaid charge by arrangement before Drogheda District Court. On that date the respondent, the Director of Public Prosecutions, directed that the matter be tried on indictment.

3rd March, 2005 – The applicants' solicitors received a letter from the State Solicitor for Co. Meath, enclosing a copy of a letter dated 21st February, 2005, from Detective Garda Martin Flood of Blanchardstown Garda Station. The letter reported that the mini-digger and trailer had been returned to the owner having being photographed by the gardaí and that the mini-digger had since been sold at auction in Scotland. The trailer was still in the owner's possession and could be made available for viewing at Blanchardstown Garda Station.

4 March, 2005 – The applicants appeared before Drogheda District Court and were served with a Book of Evidence. The matter was then sent forward to the next sitting of Trim Circuit Court.

22 March, 2005 – The applicants' solicitor wrote to the State Solicitor asking for disclosure of various items including the photographs taken by the gardaí of the mini-digger and trailer. A copy of this letter was sent to the Superintendent at Blanchardstown Garda Station and to Detective Garda Hyland, Detective Garda Flood and Detective Garda Carroll

6 April, 2005 and on 13 April, 2005 – The applicants' solicitor sought a response from Detective Garda Hyland to the letter of the 22 March, asking when the mini-digger had been disposed of.

15 April, 2005 – The applicants' solicitor received a letter from the State Solicitor for Co. Meath saying that Detective Garda Flood would ascertain on what date the mini-digger was sold.

22 April, 2005 – The applicants' solicitor received a letter from Detective Garda Flood dated 21 April, 2005 stating that the mini-digger had been sent to a depot in Belfast on the week ending 15th January, 2005 and was forwarded along with a number of other mini-diggers and sold for £8,000 sterling.

16th May, 2005 – The applicants' solicitor wrote to the State Solicitor for Co. Meath seeking a copy of the document confirming the sale of the digger at auction and the price for which it was sold along with information as to the precise date that the mini-digger and the trailer were returned to their owner by the gardaí.

20th June, 2005 - By order of the High Court (McKechnie J.) the first named applicant was given leave to seek an order by way of declaration, prohibition or injunction restraining the first named applicant's criminal trial on the count of possession of stolen property. By order of the High Court (McKechnie J.) the second named applicant was given leave to seek an order by way of prohibition or injunction restraining the respondents from prosecuting his trial on the count of handling stolen property. He was further granted leave to seek declarations that the failure of the second respondent to preserve the mini-digger was in breach of his right to a fair trial in due course of law, the failure to seek out and preserve evidence, in particular to carry out forensic analysis on the mini-digger is in breach of his right to a trial in accordance with law and a declaration that he was entitled to be informed of the intention of the second named respondents to restore the mini-digger to its owner.

The Applicants' Submissions

Grounds upon which the relief is sought
1. Failure to preserve evidence

The applicants maintain that an opportunity to examine the mini-digger independently would have assisted them in their defence. The failure of the prosecution to preserve the mini-digger for inspection has placed the applicants at a serious disadvantage and furthermore, the prosecution failed to have regard to its special obligation of seeking out, preserving and disclosing all relevant evidence.

An independent valuation of the mini-digger may have made a difference on the issue of jurisdiction as the District Court judge may have viewed the matter as being fit to be tried summarily. The price of £8000 sterling for which the mini-digger is stated to have been sold in February, 2005 (as stated in the letter of 21st April, 2005 from Detective Garda Flood) is significantly lower than the value previously put on the mini-digger by the respondents. In his statement contained in the Book of Evidence, the owner of the property, Mr. David Hutchinson stated the value of the mini-digger to be €20,000 (replacement value €29,000) and the value of the trailer to be €4000. The value of the property put on the applicants' charge sheets was put at €30,000.

The first named applicant, Robert Byrne, when interviewed at Blanchardstown garda station made no admission and he consistently stated that he had no knowledge that the property was stolen. He was travelling in the passenger seat of a car towing the property and he put the value of both the trailer and the mini-digger at between €5000 and €6000.

The second named applicant, Liam McKenna, when interviewed stated that he had paid €3000 for the mini-digger and not the trailer. Mention was also made by the applicant in the course of that interview that the approximate value of the mini-digger was €10,000. At all other times the course of that interview was concerned with the mini-digger, not the trailer and the valuation of €30,000 was never addressed or put to the applicant.

It is submitted on behalf of the applicants that to preserve the mini-digger in order to allow an opportunity for it to be examined independently would have assisted the applicants materially in the conduct of their defence. The failure to do so has resulted in the applicants ability to defend the charge and being accorded a fair trial in due course of law being impaired and the applicants would be prejudiced were the trial to proceed.

2. The right to a fair trial in due course of law in accordance with Article 38.1of the Constitution has been violated

It was submitted on behalf of the applicants that the second named respondent, the Director of Public Prosecutions, failed to comply with the principles of natural and constitutional justice and basic fairness of procedures in regard to the investigation of the offence. The prosecution failed to conduct any forensic testing on the recovered vehicle or the applicants and had irreparably prejudiced the prospect of the applicants obtaining a fair trial in accordance with the law. Furthermore, it was submitted that the second named respondent had failed to have any or any adequate regard to his duty to disclose to the applicant his intention to restore the mini-digger to its owner. Such behaviour denied the applicants the opportunity of examining the vehicle and deprived each applicant of the opportunity to rebut the evidence against him. The applicants have been advised that an examination or valuation of the mini-digger cannot be conducted on the basis of photographs. The foregoing amounts to a failure to ensure that the applicants would be afforded a fair trial particularly in three respects:

(i) The issue of jurisdiction

An independent expert's assessment and valuation of the mini-digger might have made a difference on the issue of jurisdiction and the matter would probably have been viewed as a minor matter fit to be tried summarily had the initial valuation of the property been lower. It was submitted on behalf of the applicants that the issue of value influenced the District Court judge when he refused jurisdiction.

(ii) The issue of the first named applicant's guilt or innocence

An independent assessment and valuation of the mini-digger would have been central to the substance of the first named applicant's guilt or innocence, particularly in terms of the mens rea for the offence of possession of stolen property charged under section 18, by assisting the first named applicant in displacing the presumption of knowledge contained in subsection 2 of section 18:

> "(2) Where a person has in his or her possession stolen property in such circumstances (including purchase of the property at a price below its market value) that it is reasonable to conclude that the person either knew that the property was stolen or was reckless as to whether it was stolen, he or she shall be taken for the purposes of this section to have so known or to have been so reckless, unless the court or the jury, as the case may be, is satisfied having regard to all the evidence that there is a reasonable doubt as to whether he or she so knew or was so reckless."

(iii) Cross-examination of David Hutchinson

It was argued on behalf of the applicants that an independent assessment and valuation of the mini-digger would have enabled the defence to cause the prosecution witness David Hutchinson to be cross-examined as to his credibility considering that in the statement contained in the Book of Evidence he valued the mini-digger at €20,000, yet he sold it at auction for only £8,000.

3. Prejudice

The prejudice suffered by the applicants arises from the failure of the gardaí to preserve the mini-digger for inspection. This failure to preserve evidence has placed the applicants at a serious disadvantage and each applicant has been prejudiced as to the conduct of his defence. The mini-digger was returned to its owner and disposed of despite the fact the applicants' solicitors had written on several occasions to the gardaí and to the State Solicitor seeking its preservation for examination. Accordingly, if the trial proceeds the applicants will have been unfairly and irretrievably prejudiced in seeking to defend the matter and any trial against the applicants will therefore amount to an unfair trial.

4. Irreparable loss and damage

The applicants will suffer irreparable loss and damage if the relief sought is not granted and damages will not be an adequate remedy.

Legal issues relied upon by the applicant
The duty to preserve evidence

Counsel on behalf of the applicant argued that the duty of the gardaí to preserve all evidence having a bearing or potential bearing on the issue of guilt or innocence is well established in a series of cases. The test established for deciding whether judicial review should be granted in 'preservation of evidence' cases is that the applicant might be at 'real risk of an unfair trial'. The applicants argued that the second named respondents had in their possession, evidence which they failed to preserve. The evidence was disposed of in what was described by counsel as 'a blatant disregard for its preservation' despite communications received from the applicants' solicitor that they sought to carry out an independent examination on the evidence.

Counsel for the applicant's relied on a number of cases which held that evidence relevant to guilt or innocence must be retained.

In *Murphy v. Director of Public Prosecutions* [1989] ILRM Lynch J. granted to the applicant an injunction where the gardaí had been made aware at an early stage of proceedings of the applicant's wish to inspect a car in their possession for forensic evidence including fingerprints where the applicant's opportunity to defend his case and rebut the visual identification of the gardaí had been materially affected. Lynch J. said that the evidence relevant to guilt or innocence must be kept until the conclusion of the trial 'so far as is necessary and practicable'. He stated at p.76:-

> "Clearly the courts envisage that an accused person be afforded every reasonable opportunity to inspect all such relevant evidence in order to adequately prepare his defence."

In *Braddish v. Director of Public Prosecutions* [2001] 3 I.R. 127 the video of a shop robbery was in the possession of the gardaí but was unavailable before trial because it had been returned to the owner who had wiped it. The gardaí chose not to rely on the video as evidence but to advance the case solely on the basis of a confession. The video had been requested from the applicant's solicitor at an early stage in the proceedings. The applicant was granted an order restraining his prosecution on the basis of the non availability of the video-tape evidence. Hardiman J. held at p.133 :-

> "It is the duty of the gardaí, arising from their unique investigative role, to seek out and preserve all evidence having a bearing or potential bearing on the issue of guilt or innocence."

Counsel on behalf of the applicants says that this principle applies not only to those with direct and established evidential significance, but also to the preservation of articles that may give rise to a reasonable possibility of securing relevant evidence, including evidence that might damage the opponent's case.

In *Dunne v. Director of Public Prosecutions* [2002] 2 I.R. 305 the majority of the Supreme Court allowed the applicant to succeed in his claim to restrain prosecution where he had been charged with a robbery and the gardaí denied having been given a video of the alleged incident although the owner of the shop said that it was policy to give the gardaí a video of the robbery. It was held that the video was 'relevant material' and Hardiman J. said at p.313:-

> "… material may be relevant to the investigation if it appears … that it has some bearing on any offence under investigation or any person being investigated, or on the surrounding circumstances of the case, unless it is incapable of having any impact on the case."

In *Bowes v. Director of Public Prosecution* [2003] 2 I.R. 25 Hardiman J. citied with approval the criteria for judging the 'real risk of an unfair trial' in the judgment of Finlay C.J. in *Z v. Director of Public Prosecutions* [1994] 2 I.R. 476 at p. 507:-

> "Where one speaks of an onus to establish a real risk of an unfair trial it necessarily and inevitably means an unfair trial which cannot be avoided by appropriate rulings and directions on the part of the trial judge. The risk is a real one but the

unfairness of trial must be an unavoidable unfairness of trial."

In *McGrath v. Director of Public Prosecutions* [2003] 2 I.R. 25 the prosecution were proposing to present a case where the applicant was charged with dangerous driving causing death in the absence of any witnesses on the basis of remarks made by the accused in the aftermath of the accident when she was in a state of shock. The gardaí had parted with the motorcycle involved in the collision more than two months before proceedings were taken. The defence sought to examine it within days of service of the Book of Evidence. In that case the Supreme Court concluded that the applicant had suffered the loss of a reasonable prospect of obtaining evidence to rebut the case made against her.

In *McKeown v. Director of Public Prosecutions* (Unreported, Supreme Court, 9th April, 2003) McCracken J. refused judicial review because the evidence sought to be examined by the applicant would have been of no benefit to the defence and there had been a delay of ten months after charge in seeking the examination. McCracken J. held that the question is whether the evidence could be of assistance to the defence, but that evidence should only be returned to the true owner:-

> "after notice has been given to the accused person or his legal advisors of the intention to return the evidence and a reasonable time given for an accused or his advisors either to examine the evidence or to dispense with the examination."

In the course of his judgment McCracken J. also stated:

> "The jurisdiction of the High Court to prohibit a trial is based on the basic and constitutional right of an accused to a fair trial. It is the duty of the court to keep a reasonable balance between the obligation of the prosecution to present as strong a case as possible against wrong doers, and the right of an accused to defend himself and in so doing, by all legal means, to attempt to show that there may be a reasonable doubt as to his guilt or innocence."

In *Scully v. Director of Public Prosecutions* [2005] 1 I.R. 242 Hardiman J. for the Supreme Court refused judicial review on the grounds that the applicant's delay in seeking sight of a CCTV video originally in the possession of the gardaí because the "lapse of time between the charging of the applicant and his application for relief on the eve of his trial was, in all the circumstances of this case, excessive." (at p. 246). The delay was found to be significant not so much for its bare length as for "the indication that it provides that the case is based on a 'remote, fanciful or theoretical' possibility, rather than a real desire to obtain evidence believed to be potentially exculpatory." In coming to his decision Hardiman J. followed the test established in *Z v. Director of Public Prosecutions* of "real risk of an unfair trial".

In *McFarlane v. Director of Public Prosecutions* (Unreported, Supreme Court, 7th March, 2006) the majority of the Supreme Court allowed the respondents appeal against a High Court decision preventing the applicant's trial from proceeding on the basis that certain exhibits from which fingerprint evidence had been taken had gone missing and were not available for inspection by the applicant. Hardiman J. for the majority criticised the loss of the evidence but held that there was a chain of evidence covering the identification of the fingerprints, the photographing of the prints and the preservation of the photographs and that no attempt had been made to suggest that meaningful comparison would not be possible using the photographs or

> "that any additional advantage might have accrued to the defendant on the basis of a comparison with the actual marks made on the items as opposed to photographs of them."

Hardiman J. distinguished the case from that of *McGrath* where:

> "An expert engineer on behalf of the applicant stated that due to the non-availability of an item of real evidence he was unable to carry out specific tests the result of which might have had an obvious benefit to the defence. There is no basis on the evidence in this case for an agreement that "the applicant has been deprived of the reasonable possibility of rebutting the evidence proffered against him" …In order to demonstrate that risk there is obviously a need for an applicant to engage in a specific way with the evidence actually available so as to make the risk apparent. A failure to do this was the basis of the failure of the applicant in *Scully* 1 I.R. 242. This is not a burdensome onus of proof: what is in question, after all, is the demonstration of a real risk, as opposed to an established certainty, or even probability of an unfair trial."

He concluded:

> "Quite obviously the gardaí have been in breach of their duty to preserve the evidence, but in this case, unlike the others, this breach has not resulted in the loss of that evidence in an independently verifiable form."

In *Ludlow v. Director of Public Prosecutions and Judge O'Shea* (Unreported, High Court, Dunne J., 16 July, 2006) Dunne J. granted relief to prohibit a trial arising from a dangerous driving incident where the vehicle involved had been returned to its owner and the tyres of that vehicle, the subject of additional charges had been disposed of by the owner. The argument proffered by the respondents in that instance placing reliance upon the fact that detailed photographs had been furnished was rejected by Dunne J. She stated:

> "there cannot be any doubt as to the importance in the present case of the tyres for the purpose of permitting a forensic examination to be carried out with a view to obtaining evidence with which to rebut the technical evidence to be given by Sergeant Prendergast. Therefore, I am satisfied that there was a duty to preserve the tyres. There is no evidence before me to suggest that this was not possible to do."

The applicants herein also rely on the decision of Charleton J. in *Toohey v. Director of Public Prosecutions* (Unreported, High Court, Charleton J., 16 January, 2007) where judicial review proceedings had arisen from the applicant's prosecution arising from a road traffic accident, wherein he had been charged with dangerous driving and driving a vehicle with a worn tyre. A similar approach was taken as that in Ludlow based upon the fact that neither the vehicle or the tyres were preserved for the defence expert to examine:-

> "What is required is a reasonable opportunity for an expert on behalf of the defence to examine vehicles. Possibly at the request of an expert, or by decision of the Gardaí, certain portions of a vehicle, such as its tyres, or relevant paint scrapings, might be preserved. The duty on the investigating and prosecuting authorities must be, however, in such cases, to create a circumstance whereby such an inspection will become possible."

The applicants' contend that from the abovementioned case-law, a number of issues critical to the outcome of judicial review applications seeking 'preservation of evidence' may be identified here.

(i) The date on which the applicants' solicitor has made the request of access to the evidence.

Counsel for the applicants say that on the issue of timing of the request by the applicant, the courts have clearly disapproved of excessive delay in making a request. However counsel argues that for the purpose of considering whether there has been excessive delay time will not necessarily start to run from the date of the offence or even from the date upon which the accused is charged as the significance of the evidence in question may not be apparent until the service of the Book of Evidence. In this instance matters had been struck out due to non-availability of the Book of Evidence in October, 2004. Further, it is pointed out by counsel for the applicants that their solicitor sought confirmation from the respondents that the property in issue was being preserved for examination and requested an opportunity to examine the property at an early stage in the proceedings, with his first letter dated 27th September, 2004 sent prior to the service of the Book of Evidence.

(ii) The time at which the gardaí parted with possession.

Counsel for the applicants argues that it is not clear when the gardaí returned the mini-digger to its owner but it appears that it was disposed of by its owner subsequent to the initial letter of the 27th September, 2004 and subsequent to other similar correspondence from the applicants' solicitor sent in January, 2005.

(iii) The evidential relevance of the items in issue.

Counsel for the applicants say that an expert engineer has stated that due to the non-availability of the mini-digger he is unable to carry out specific tests the result of which might have had an obvious benefit to the defence. Counsel avers that applying the reasoning of Hardiman J. in *McFarlane* and particularly the judgments of Dunne J. in *Ludlow* and Charleton J. in *Toohey* shows that the photographic evidence of the mini-digger is not a proper substitute for the real evidence to rebut the prosecutions allegations at trial and that accordingly the applicants have established the requisite standard that a real risk exists that due to the non-availability of the evidence in question, they may face an unfair trial.

The Director of Public Prosecution's Submissions

1. No culpability on the part of the gardaí

On behalf of the second named respondent it is submitted that the applicants have not demonstrated that the gardaí were to blame for the non-retention of the mini-digger. The respondent argues that unlike cases such as *DPP v. Braddish*, where blame could clearly be attached to the gardaí in failing to seek out or preserve evidence, the gardaí in the present case cannot be criticised. The respondent points out that the mini-digger was examined and photographed by the gardaí and the photographs were made available to the defence. The mini-digger was returned to the owner along with the trailer at the owner's insistence as these items were of considerable value and loss to the owner. It is submitted that this is a relevant matter for this Court to consider. The affidavit of Detective Garda Flood states that the owner of the property, Mr. Hutchinson was informed by the gardaí that the property may be required for a court case and that he should not dispose of it. Notwithstanding the fact that the gardaí made it clear to Mr. Hutchinson that the mini-digger should not be disposed of, he forwarded it to the company's depot in Belfast and from there it was forwarded with a number of other vehicles to Scotland where it was disposed of at auction.

2. Issue of jurisdiction

The Director of Public Prosecutions has argued that it cannot with any degree of certainty be stated the District Court judge would have arrived at a different view on the issue of jurisdiction had the applicants adduced independent evidence vouching a lower valuation for the mini-digger. The respondent argues that it is likely that the judge took into consideration a number of matters over and above the value of the property when deciding whether or not to accept jurisdiction. The respondent submits that such other matters considered by the District Court judge would have included the organised nature of the alleged crime, the fact that the vehicles appeared to have been stolen to order, the fact that the enterprise appears to have been carried out to order and the fact that the incident involved the theft and transporting of two large vehicles. It is submitted that leaving aside the issue of valuation, the judge made his decision following an outline of the evidence and was entitled to form the view that the case before him was non-minor. It is submitted that the applicant has not demonstrated that as a matter of probability the District Court judge would have come to a different conclusion had he before him the subsequent information concerning the price that the mini-digger was sold for. The sale of the digger for £8000 sterling equates to €10,152 approximately and the owner of the vehicle explained that this was an artificially low price because his company was prepared to take a loss on the old diggers which were sold as part of a package because of a good deal they were apparently getting on new vehicles they were buying. The owner claims that the digger would have been worth a lot more if sold in an individual sale. Furthermore, as it is unlikely that the disputed valuation would have impacted on the District Court's decision to refuse jurisdiction and as the applicants have not sought to challenge that decision, it must be regarded as valid. The respondent further submitted that merely because information might emerge subsequent to a District Court judge deciding on jurisdiction, casting doubt on the valuation for stolen items in a theft or handling prosecution does not and should not cause a prosecution to collapse, all the more so when one is dealing with valuations that are estimates and which in the case of vehicles may depreciate in value over time.

3. The relevance of the valuation to the issue of guilt or innocence

On behalf of the second named respondent it was argued that the first named applicant's point that the unavailability of the mini-digger for inspection had impaired the applicant's ability to conduct his defence or to procure evidence that would have been relevant to his position and the issue of guilt or innocence has not been demonstrated. The respondent points out that the applicant does not deny that he was arrested with two other men inspecting the vehicles at the scene where the gardaí carried out their surveillance. Nor is it denied that the vehicles were stolen. The only issue appears to be whether or not he was aware or reckless as to whether the mini-digger and trailer were stolen. The applicant is free to make out a case as to how he came to be in possession of the vehicles and to make out a case that he was unaware that they were stolen. The only connection that the first named applicant makes between the lost opportunity to inspect the vehicle and the issue of guilt or innocence is the claim that because he maintains that he cannot produce an independent valuation of the digger he cannot disprove the vehicles were to be purchased at a price below their market value. The second named respondent maintains that the applicant has failed to demonstrate any such thing and it is open to him to make whatever case he wishes with a view to discrediting the prosecution valuation.

The Director of Public Prosecutions says that the claimed impairment of the applicant's ability to defend himself contrasts with cases such as dangerous driving causing death where the vehicles involved are no longer available for inspection. The respondent claims

that the present case can be distinguished from those 'missing video' cases where an accused person demonstrates the likelihood of a missing video would have shown the injured party to be the troublemaker. No such claim is being made by the applicant in this case. The respondent argues that even within the narrow remit of the applicant's argument that he has been deprived of an opportunity to call expert evidence as to the true value of the mini-digger, that evidence comes up short. The respondent makes the point that in the affidavit of Kenneth Cromwell, the valuer retained by the applicant, he states that he would need to see the machine and perhaps operate it but he does not comment on the possibility of giving a valuation based upon other factors such as the purchase price, the age of the mini-digger, its crash history and overall specifications. Nor is there anything in Mr Cromwell's affidavit stating whether he agrees or disagrees with the information offered by the owner of the mini-digger in the letter to the gardaí.

In the case of the second named applicant, Liam McKenna, it is submitted by counsel on behalf of the Director of Public Prosecutions that in judicial review applications such as this the Court, notwithstanding the fact that the applicant enjoys the presumption of innocence in the criminal trial, is entitled to have regard and attach considerable weight to the fact that cautioned admissions as to the matters charged were made by him while in custody which appear to make it plain that he knew that the vehicles were stolen.

4. Credibility of David Hutchinson

The second named respondent avers that it remains open to the first named applicant to query Mr. Hutchinson's valuation of the mini-digger. The defence can cross examine him as to the valuation given in the Book of Evidence versus the lower valuation given in the letter to the gardaí. It is open to the defence to adduce whatever evidence it sees fit concerning the likely value of that type of vehicle with a view to refuting the suggestion that the property was purchased below market value. According to the prosecution's case (and it is not denied by either applicant) the second named applicant was the purchaser of the vehicles which he knew to be stolen and also knew that the vehicles were being sold to him at undervalue.

5. Applicants' delay

The second named respondent contends that the applicants are out of time to bring these judicial review proceedings. Order 84 r. 21 of the Rules of the Superior Court require that an application for an injunction by way of judicial review be made promptly and, in any event, within three months from the date when grounds for the application first arose. The second respondent avers that leave to issue the within proceedings was not sought until the 20th June, 2005, more than three months outside the service of the Book of Evidence which had been on the 4th March, 2005. The respondent argues that the applicant is out of time to seek the relief being sought and on that ground alone the application for the relief of judicial review should be refused. The respondent argues that the applicants' delay in seeking inspection facilities for the mini-digger is also of relevance. The applicants first sought preservation of the evidence on the 27th September 2004, eleven weeks after their arrest for the offences related to the vehicle. The respondent further states that the applicant delayed in availing of the respondent's offer to inspect the trailer. It is contended that this delay coupled with the fact that the inspection itself was cursory and lasted minutes; no written notes or photographs were taken of the trailer, illustrates the limited relevance and significance of the demand that inspection facilities be made available and it is asserted that the delay in inspecting the trailer indicates the applicants' true view of the value which any such inspection would have had.

Legal issues relied upon by the second respondent

Jurisdiction to stay proceedings
By virtue of Article 30.3 of the Constitution of Ireland, the prosecution of offences is committed to the executive branch of the government, specifically to the Director of Public Prosecutions in the case of proceedings on indictment (s. 3 Prosecution of Offences Act, 1974) and the trial of offences is committed to the courts established by law in accordance with the Constitution. Thus it is submitted that the point of departure for this Court is that every judge presiding over a criminal trial will take all necessary and appropriate steps to ensure that the trial is conducted in due course of law as stated by Lynch J. in *P.C. v. Director of Public Prosecutions* [1999] 2 I.R. 25 at 77. It follows that only in exceptional circumstances should the superior courts intervene to prohibit a trial from taking place. It follows that an applicant seeking such relief carries the onus of establishing, on the balance of probabilities, that there is a real risk that he will not receive a trial in due course of law as accorded to him by Article 38.1 of the Constitution. These principles are now well established. In *Z v. Director of Public Prosecutions* [1994] 2 I.L.R.M. 481 Finlay C.J., said at 498:-

> "This Court in the recent case of *D v. Director of Public Prosecutions* [1994] 1 I.L.R.M. 435 unanimously laid down the principle that the onus of the proof which is on an accused person who seeks an order prohibiting his trial on the ground that circumstances have occurred which would render it unfair is that he should establish that there is a real risk that by reason of those circumstances…he could not obtain a fair trial."

Finlay C.J. went on to describe the onus upon the applicant seeking to stay his trial in the following terms at p. 499:-

> "…an onus to establish a real risk of an unfair trial … necessarily and inevitably means an unfair trial which cannot be avoided by the appropriate rulings and directions on the part of the trial judge. The risk is a real one but the unfairness of trial must be an unavoidable unfairness of trial. "

The approach in *D* was followed by Hamilton P. in the High Court in *Z v. Director of Public Prosecutions* who, after referring to the standard of proof resting upon the applicant as described by Finlay C.J. in *D v. Director of Public Prosecutions* made the following observation at p. 495:-

> "This standard of proof was accepted by the other members of the Supreme Court. In the course of his judgment in the case of Jago v. District Court of New South Wales (1989) 168 CLR 23, Mason CJ stated (at p. 34):
>
> > "To justify a permanent stay of criminal proceedings, there must be a permanent defect which goes to the root of the trial 'of such a nature that nothing a trial judge can do in the conduct of the trial can relieve against its unfair consequences"
>
> If the phrase 'real or serious risk' was inserted before 'a permanent' in that passage, the test would be the same."

The respondent relies on the Supreme Court decision of *Bowes v. Director of Public Prosecution* [2003] 2 I.R. 25 to demonstrate that there is a heavy onus on an applicant seeking prohibition to establish the relevance of missing evidence. In *Bowes* the applicant faced a charge of the possession of heroin for sale and supply. The prosecution alleged that a quantity of heroin was found in the boot of a car driven by the accused. In Bowes the car was not itself relevant to the case except in the sense that it had been driven by the accused. The Supreme Court concluded that there was no real loss of opportunity to the defence to rebut the prosecution case.

The respondent argues that recent jurisprudence in this area indicates that 'lost evidence' cases fall to be viewed within a certain range. The respondent says that there are cases such as *McGrath v. Director of Public Prosecutions* [2003] 2 I.R. 25 where the missing evidence is directly relevant to the issue of guilt or innocence and cases such as Bowes where the evidence of the car was not directly relevant to the case, except in the limited sense that drugs were found in the car. In *McGrath* accident reconstruction was a significant element in that case and the applicant's engineer found himself considerably disadvantaged as he was unable to deduce the closing impact speed of both vehicles or eliminate any mechanical condition of the motorcycle that might have contributed to the collision. The respondent avers that the instant case lies well beyond the outer extremity represented in Bowes and no loss of opportunity to rebut the prosecution case has occurred less still has any such loss been demonstrated.

The respondent further argues that there is a need for the applicant seeking prohibition to engage with the evidence so as to establish a real risk of an unfair trial. In *Scully v. Director of Public Prosecutions* [2005] 1 I.R. 202 at p. 252 Hardiman J. was critical of an accused making vague assertions of prejudice without setting out in clear terms how a particular line of defence had been lost to him:-

> "[A]ll the applicant has done here is merely to invoke the possibility that exculpatory evidence at one time existed, that there was something visible on the video, despite the new evidence. He must do more than that. In the words of Finlay C.J. in Z. v. DPP [1994] 2 I.R. 476 at 507 he must '… establish a real risk of an unfair trial…': the importance of the first adjective in this phrase is that it excludes a risk which is merely remote fanciful or theoretical. The need to meet this requirement involves a much greater engagement with the actual state of the evidence than is apparent here."

The respondent also relies on *McFarlane v. Director of Public Prosecutions* (Unreported, Supreme Court, 7th March, 2006) to demonstrate that prohibition will be refused where it is open to the accused to seek to prove a particular fact by means of an alternative source of evidence. Giving the majority judgment in that case, Hardiman J. returned to the theme of requiring an applicant to engage with the prosecution and stated that an applicant for prohibition must show, on the basis of the facts alleged that a particular line of defence or opportunity to cross-examine has been lost to him as a result of the garda negligence. Kearns J. in the minority said that common sense parameters of reasonable practicality must govern any determination of the scope of the duty on gardaí when seeking out or preserving evidence, The remote possibilities arising from the loss of evidence should not, according to Kearns J. be allowed "to trip up the prosecution or justify stopping a trial from taking place." In the same case, Hardiman J expressed criticism at the applicant's attempts at engaging with the prosecution case:

> "Insofar as this ground is urged on the basis of general prejudice, I am unimpressed by it. The whole of the case in this regard is based on a single sentence from the grounding affidavit of Mr. McGuill, solicitor for the applicant, which is quoted above. That is no more than a general statement of the effect of a lapse of time. It makes no attempt whatever to engage with the actual circumstances of the applicant himself at the relevant time. On the 25th September, 1983, he had undoubtedly escaped from lawful custody in Northern Ireland. The next uncontroversial statement that can be made about his whereabouts is that he was in the Netherlands in January of 1986 in possession of a stolen or forged Irish passport. The applicant has said nothing about his whereabouts during any part of that time and, vitally, has not asserted, or caused his solicitor to assert, either how he spent the time, or that he cannot recall where he was, during the period of Mr. Tidey's captivity in late November and up to the 16th December, 1983. A remote, fanciful or purely theoretical form of prejudice is plainly not sufficient to entitle him to relief. An applicant in this position must address if it is possible the actual specific facts of his case and this present applicant has singularly failed to do."

In the recent Supreme Court case of *P.H. v. Director of Public Prosecutions* (Unreported, Supreme Court, 29th January 2007) the court emphasised that prejudice will not be sufficient to prohibit a trial if it relates to evidence the essence of which can be obtained from other sources. Giving the judgment of the court, Hardiman J. said:-

> "It seems to me that the Director has been able to point to the probable availability from other sources of at least the essence of the nurse's evidence, and that this is sufficient to avoid the inference that there is a real or serious risk of an unfair trial. Obviously, if the Director were hereafter, by cross-examination or otherwise, to belittle the evidence available from the other sources in its veracity or its significance, a different position might then obtain. But that, I am satisfied, is something that can be dealt with by the trial judge if and when it occurs."

Role of the trial judge

The respondent points out that it is the obligation of the trial judge to ensure fairness of the trial and to adjudicate on the validity of orders authorising detention of an accused. In *Blanchfield v. Hartnett* [2002] 3 I.R. 207 Fennelly J. stated at p. 226:-

> "Once the judge at trial possesses any necessary powers and once, as in *Clune v. The Director of Public Prosecutions* [1981] I.L.R.M. 17, it must be presumed that he will exercise those powers fairly and justly, there is no need for the High Court to intervene. It is usually preferable to allow the trial judge to hear evidence concerning all the elements bearing on the issue of whether evidence should be admitted than to take one issue such as the validity of an order to be dealt with in isolation. It should also be borne in mind that the illegality of such an order is not, in any event, determinative of the issue of admissibility. Taking the issue out of its proper context may create a misleading impression as to its impact."

Counsel for the respondent say that case-law has asserted the supremacy of the trial judge's function in ensuring fairness in criminal proceedings and as such the complaints which the applicants herein are seeking to litigate should be more properly dealt with by the trial judge.

Resort to the High Court Rare and Exceptional

The respondent seeks to rely on the decision of Keane C.J. in *McLoughlin v. Director for Public Prosecutions* (Unreported, Supreme Court, 8th November 2001) to establish that the circumstances in which the High Court will interfere and is entitled to interfere by way of prohibition in a criminal trial which is imminent are limited. Keane C.J. said that the High Court can do so "when the delay by the prosecution is such as to violate the accused's right to an expeditious trial, a right guaranteed under the Constitution as an essential feature of a 'trial in due course of law'". The respondent also relies on the judgment of Denham J. in *D.C. v. Director of Public Prosecutions* [2006] 1 ILRM 348 to show that the jurisdiction to intervene is exceptional:-

> "The applicant in this case seeks to prohibit a trial in which he is the accused. Such an application may only succeed in exceptional circumstances. The Constitution and the State, through legislation, have given to the respondent an independent role in determining whether or not a prosecution should be brought on behalf of the people of Ireland. The respondent having taken such a decision, the courts are slow to intervene. Under the Constitution it is for a jury of twelve peers of the applicant to determine whether he is guilty or innocent. 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.

It is this exceptional jurisdiction which the applicant wishes to invoke. 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 the applicant could not obtain a fair trial."

Both *Blanchfield v. Hartnett* and *McLoughlin v. Director for Public Prosecutions* were relied on by Murphy J. in *McNulty v. Director of Public Prosecutions* and Judge White (Unreported, High Court, Murphy J., 15th March, 2006) where prohibition was refused on the basis that the applicant's complaint should more properly be dealt with by the trial judge who should be entrusted with the task of ruling on admissibility disputes in general. The respondent also refers to the decision in *McCormack v. Director of Public Prosecutions* (Unreported, High Court, Charleton J., 17th April, 2007) where it was held that the court has no jurisdiction to decide issues of admissibility at trial by way of an application for judicial review.

Decision
The second named respondent contends that the applicants are out of time to bring these judicial review proceedings. They submit that O. 84, r. 21 requires that an application for an injunction by way of judicial review be made promptly and in any event within three months from the date when the grounds of the application first arose. The leave to issue these proceedings was not sought until 20th June, 2005 which is outside the three month period from service of the book of evidence which had been on 4th March, 2005. Counsel for the respondent in his submissions made the case that time began to run on the date that the letter was received on 3rd March, 2005, to the effect that the digger had been sold. In either event, it would appear that the period of three months was exceeded by either 16 or 17 days. I was not informed whether this matter was raised at the application for leave to seek judicial review which I would have considered to be the appropriate place for it to be raised. In all the circumstances of this case I am not prepared to refuse the application on the basis of delay and if it is necessary for me to do so, extend the time up to and including 20th June, 2005.

The court is asked to prohibit the trial of both of the applicants on the basis that owing to the unavailability for full inspection of the Volvo mini-digger the subject matter of the charges against them, they would not receive a fair trial on the charges respectively of possession of stolen property and handling stolen goods.

The second applicant also seeks declarations that the failure to preserve the mini-digger, the failure to seek and preserve evidence and to carry out a forensic analysis on the mini-digger were in breach of his right to a fair trial and further that he was entitled to be informed of the intention of the second respondent to restore the mini-digger to its owner.

The onus on the applicants in this regard is set out by Finlay C.J. in *Z. v. D.P.P.* (cited above):-

> "This Court in the recent case of *D. v. Director of Public Prosecutions* [1994] 1 I.L.R.M. 435 unanimously laid down the principle that the onus of the proof which is on an accused person who seeks an order prohibiting his trial on the ground that circumstances have occurred which would render it unfair is that he should establish that there is a real risk that by reason of those circumstances … he could not obtain a fair trial."

Finlay C.J. further observed at p. 499: -

> "… An onus to establish a real risk of an unfair trial … necessarily and inevitably means an unfair trial which cannot be avoided by the appropriate rulings and directions on the part of the trial judge. The risk is a real one but the unfairness of trial must be an unavoidable unfairness of trial."

This standard has been applied as noted in the respondents' submissions in cases as recent as *Scully v. D.P.P.* (cited above), *McFarlane v. D.P.P.* (cited above) and in *P.H. v. D.P.P.* (also cited above).

It is clear from these cases that the jurisdiction to intervene is a rare and exceptional one. Do such circumstances exist here as meet that high standard?

The actions of the Gardaí
Whilst it is clear that the Gardaí are obliged to preserve evidence, there are circumstances where this must be done with some degree of commonsense and practicality. To cite Lynch J. in *Murphy v. Director of Public Prosecutions* (cited above) "so far as is necessary and practicable". To continue to withhold possession of valuable machinery such as a mini-digger from its hire company owner would be to doubly victimise the victim of the crime alleged. There might well be circumstances where that is inevitable but I doubt they exist here. The mini-digger is of a well known type and model, its age is known and its condition can surely be evidenced by inspection of the photos already taken by the Gardaí and the report of the Garda Inspector and further from the records of the hire company and other independent evidence. If this were not so, the trial judge ought to be able to deal with the matter on an application to exclude evidence or any other appropriate application. In my view, the Gardaí quite properly returned the machine with advice that it should be retained as possible evidence. It was later, apparently, inadvertently, sold off as part of a batch. I note in passing that the sale price for a sum lower than that assessed in the Book of Evidence is something that may be favourable to the accused. In sum it seems to me that the Gardaí acted quite properly in the manner they did.

The decision of the District Judge
It is argued by the applicants that had there been an opportunity for them to inspect the digger they might have been able to convince the District Judge that its value was substantially less than the value alleged in the Book of Evidence. Had this occurred, they continued to argue, the District Judge might not have decided to decline jurisdiction. This is speculative in relation to its first element and highly speculative in relation to the second. On the facts before me, there are other grounds upon which the District Judge could have relied in his decision that this was not a minor offence fit to be tried summarily, e.g. the element of organised crime involved and the apparent stealing-to-order nature of the offence alleged. On the basis of the tests to be applied to require the High Court to intervene, this falls far short of the standard.

The unavoidable unfairness of the trial
The first applicant claims the unavailability of the digger for inspection impaired his ability to defend himself or procure relevant evidence. I note he does not deny he was arrested with two other men inspecting the vehicle at the scene. Moreover, he does not deny the vehicle was stolen. The only issue seems to be as to whether he was aware or reckless as to whether the two vehicles were stolen. Central to this is the question as to how far below market price the vehicles were allegedly sold. He maintains that he now cannot disprove that they were sold below market value. It seems to me that it remains open to the applicant by cross examination or the production of evidence to disprove this. Even in the event that this were not so, I would still think that the trial judge would be the better placed to hear and decide an application in this regard. Moreover, the affidavit of Kenneth Cromwell does not comment on his ability to give a valuation based upon other factors that could be used to value the digger such as the purchase price, the age, the crash or accident history and overall specification. In regard to the second named applicant I accept the submission made on behalf of the Director of Public Prosecutions that in judicial review applications such as herein it is open to the court to take into account admissions made by the accused notwithstanding the presumption of innocence. I note in this regard that the second applicant admitted that he knew the vehicles were stolen.

For all these reasons, I cannot find that there is any unavoidable unfairness of a trial in this case. It seems to me therefore that on these crucial criteria to determine whether the rare and exceptional jurisdiction to prohibit the continuance of the trial should be applied here, I find that the applicants have fallen far short and therefore refuse the application.