Neutral Citation Number: [2006] IEHC 151

THE HIGH COURT
JUDICIAL REVIEW

[2005 No. 593 JR]

BETWEEN

DAVID FAGAN

APPLICANT

AND

THE JUDGES OF THE CIRCUIT CRIMINAL COURT AND THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

Judgment of Ms. Justice Dunne delivered on the 28th day of April, 2006

1. The applicant in this case seeks an order of prohibition by way of application for judicial review prohibiting the respondents from proceeding with the trial of the applicant herein on charges of offences contrary to s. 14 of the Criminal Justice (Theft and Fraud) Offences Act, 2001 and s. 5 of the Non Fatal Offences Against a Person Act, 1997 and s. 15 of the Non Fatal Offences Against a Person Act, 1997. The matter was originally listed for trial before the Circuit Criminal Court on 15th June, 2005. The application herein was commenced on 10th June, 2005 when leave was granted by the High Court (Dunne J.) to apply for judicial review.

2. In addition to the principle relief sought, the applicant has also sought leave to extend the time within which to bring such application. Other ancillary relief is also sought. Such ancillary relief does not raise any issues on this application.

3. I do not think it is necessary to set out the grounds upon which the relief referred to above is sought save to say that this is a case in which the applicant faces trial in relation to the matters referred to above and there was CCTV footage taken of the alleged incident but in circumstances which will become clear, such footage is no longer available. As a result the applicant claims that there has been a failure to preserve evidence having a bearing on the issue of the guilt or innocence of the applicant. It is also alleged that as a result of the failure to preserve the evidence the applicant faces a real or serious risk that he will receive an unfair trial. The applicant refers to his constitutional right to a fair trial in due course of law in accordance with Article 38.1 and Article 40.4.1 of the Constitution. In essence what is complained of is that the Gardaí did not obtain CCTV footage in a timely manner so that the relevant footage when obtained by the Gardaí had in fact been overwritten with the result that the footage of the alleged incident is no longer available either to the Gardaí or to the applicant.

4. The affidavit of John M. Quinn, solicitor for the applicant sworn herein on 8th June, 2005, set out the background to this matter in some detail. It appeared that on 25th March, 2004, the applicant herein was arrested. The evidence forming the basis for the applicant's arrest was his alleged identification from CCTV footage recording a robbery at Movie Magic, Donaghmede, on 23rd March, 2004. According to the book of evidence Detective Garda Shane Davern viewed the footage of the robbery and states that he identified the applicant from the CCTV footage. A Garda Ciaran O'Neill also stated in the book of evidence that he identified the applicant as one of the parties involved in the alleged robbery. Further, having viewed the CCTV footage, Garda Ciaran O'Neill took possession of the CD containing the CCTV footage from one Lisa Plummer, the Assistant Manager of the shop. On 25th March, 2004, the CCTV CD containing the footage concerned was given by Garda Ciaran O'Neill to Garda Declan Maloney. Thereafter the applicant was, as already stated, arrested and brought to Santry Garda Station. In the course of his detention a full statement of admission was made in relation to the robbery. As Mr. Quinn states in his affidavit the statement of admission alleged to have been made by the applicant is the principle evidence against the applicant in the criminal prosecution.

5. The applicant was then charged on 25th March, 2004 as set out above. He was released on bail to appear in court on 20th April, 2004. A book of evidence was served on 30th June, 2004, and the applicant was returned for trial to Dublin Circuit Criminal Court on 23rd July, 2004. Thereafter the matter was adjourned on 23rd July, 2004, to 1st November, 2004, for mention only for the purpose of dealing with disclosure. On 30th July, 2004, the applicant's solicitor sought disclosure from the second named respondent including CCTV footage. On 1st November, 2004, the matter was further adjourned to 24th November, 2004, for mention only as the question of disclosure was outstanding. Thereafter the applicant's solicitor received a letter dated 22nd November, 2004, enclosing a number of additional statements dealing with further disclosure. Those statements comprised a statement of Garda Declan Maloney, Donal King of Advanced Digital Communications Limited, a computer technician and Susan Butterly of Movie Magic, Donaghmede.

6. The contents of those statements are summarised at para. 11 of Mr. Quinn's affidavit. From the statements referred to it appears that Garda Maloney received a downloaded copy of video evidence from Garda Ciaran O'Neill who had in turn received it from Ms. Plummer of Movie Magic on 23rd March, 2004. He (Garda Maloney) subsequently attempted to view the downloaded footage at Santry Garda Station and was unable to do so. He contacted Susan Plummer of Movie Magic a number of months subsequently arising from this difficulty and informed her that there was nothing on the disc supplied to the Gardaí on the night of the robbery. The computer technician, Donal King, confirmed that there was nothing downloaded onto the disc. The said Donal King checked to see if the digital video recorder at Movie Magic still had on its system the footage relating to the incident on 23rd March, 2004, but there was nothing in relation to that time on the system as most digital video recorder systems overwrite material after one month and this system had overwritten the alleged incident as it was more than a month since the incident had occurred when viewed by him. Accordingly it is clear that the CCTV footage is no longer available.

7. In his affidavit Mr. Quinn asserts that the CCTV footage, if available, would have the potential to exculpate as well as to inculpate the applicant. In those circumstances he states that the failure by the Gardaí to preserve the CCTV footage amounts to a breach of the duty to preserve evidence potentially relevant to the issue of the guilt or innocence of the applicant. He goes on to state that the applicant is extremely fearful and apprehensive that he will not receive a fair trial but that the same will proceed on the basis of uncorroborated alleged confession evidence.

8. Complaint was made by Mr. Quinn that although the applicant's legal advisors sought the CCTV footage by letter dated 30th July, 2004, it wasn't until 22nd November, 2004, that the second named respondent outlined what had happened in relation to the footage. He confirmed that when the matter was before the Circuit Criminal Court on 16th December, 2004, the matter was adjourned to 18th January, 2005, for arraignment. On that date counsel appearing for the applicant indicated that it was intended to bring proceedings for prohibition. A date for trial was fixed some time after that, namely, 15th June, 2005, in order to facilitate the applicant in bringing judicial review proceedings.

9. A supplemental affidavit was sworn herein by Mr. Quinn on 8th June, 2005. Having referred to an application brought before the court for a certificate for senior counsel which was refused and having referred to consultations with counsel subsequent to 22nd November, 2004, he went on to reiterate that when the matter was listed on 18th January, 2005, counsel indicated the intention to

bring prohibition proceedings and on that basis the trial judge indicated that a trial date would be fixed sufficiently far away so that those proceedings could be brought. He added at para. 6 of that affidavit "that through inadvertence, counsel for the applicant failed to bring the within prohibition proceedings within the three months from the date when the grounds for the application first arose in accordance with the provisions of Order 84 rule 21 of the Rules of the Superior Courts." He further stated that he is "advised by counsel and believes that the time limits prescribed in Order 84 rule 21 are guidelines only and not limitation periods, compliance with which ensures that the applicant could not be refused relief by reason of delay alone." He added at para. 7 and I quote:

> "I say that counsel for the applicant had clearly formed a *bona fide*intention to bring the within proceedings within the time prescribed by the rules referred to above and counsel for the applicant had indicated this intention to the Circuit Criminal Court on 18th January, 2005."

10. I should state at this point that I am somewhat mystified as to the reference to counsel's *bona fide* intention to bring prohibition proceedings. Counsel, presumably, only acts on the client's instructions obtained via her solicitor. The intention of counsel is neither here nor there.

11. A statement of opposition was filed herein dated 3rd October, 2004. It stated that the applicant was not entitled to relief by reason of the delay in seeking leave for judicial review. This is on the basis that the applicant was aware of the position in respect of footage on 22nd November, 2004, but did not seek leave for judicial review until 10th June, 2005, some five days before the trial was due to commence. In addition the second named respondent also raises the delay in seeking the footage in question from the authorities. This is on the basis that such footage was not sought until 30th July, 2004, notwithstanding the fact that the alleged offence occurred on 23rd March, 2004. In addition the statement of opposition states that the loss of the CCTV footage is not the fault of the prosecuting authorities. Reference is also made to the fact that the applicant has made full and detailed admissions relating to his participation in the robbery. Finally, it is denied that there has been any breach of the applicant's constitutional right to a fair trial in due course of law or that there is a real or serious risk that he will receive an unfair trial.

12. A number of affidavits were sworn dealing with the matters raised in the affidavits of Mr. Quinn, that is, an affidavit of Detective Garda Shane Davern, an affidavit of Garda Declan Maloney, an affidavit of Garda Ciaran O'Neill and an affidavit of Susan Butterly and finally an affidavit of Donal King.

13. In his affidavit Detective Garda Shane Davern set out the background to this matter from his point of view. He referred to his attendance at the scene of the robbery where he viewed the CCTV footage and his identification of the two participants in the alleged robbery. Both Garda Davern and Garda O'Neill knew the applicant previously. On that date Garda O'Neill obtained the copy of the CCTV footage and was given a disc in the belief that the CCTV footage had been downloaded onto the disc. He then outlined the subsequent history of the matter. He referred at para. 18 of his affidavit to the fact that this application was brought so late in the day. According to Garda Davern this caused the injured parties to be discommoded. He said that it was not until July 2004 that the Gardaí became aware of the fact that the disc received by them was in fact blank. He added that the co-accused in relation to this matter has pleaded guilty and has been sentenced.

14. Garda Maloney in his affidavit stated that following the receipt of the applicant's solicitor's letter dated 30th July, 2004, he attempted to view the disc containing the downloaded CCTV footage but was unable to do so. He then contacted the manager of Movie Magic, Ms. Butterly and returned the disc sometime afterwards to Movie Magic so that a technician could look at it. He was subsequently informed that the disc was blank and that the system had wiped clean the original.

15. Garda Ciaran O'Neill in his affidavit outlined how he asked for the CCTV footage to be copied and that the staff at Movie Magic honestly and conscientiously attempted to download the footage. They presented a disc to him which he took away in the belief that the CCTV footage had been successfully downloaded.

16. The affidavits of Susan Butterly and Donal King are confirmatory of the matters set out in their statements contained in the book of evidence.

17. Mr. Feichin McDonagh SC appeared on behalf of the applicant herein. Having referred to the matters outlined above he argued that the facts of this case are very similar to the facts in the case of *Braddish v. D.P.P.* [2001] 3 IR 127, a decision of the Supreme Court. As in that case there was video surveillance of the location at which an alleged robbery had occurred. Likewise, the appellant in that case was alleged to have made and signed a statement admitting to the robbery. He contended that the applicant in this case had sought the material in a timely manner and he referred to the fact that what was sought was an item of real evidence. He argued that the principle to be ascertained from the decision in the case of *Braddish*, referred to above, is that there is an obligation on the prosecuting authority to preserve such items of real evidence. Mr. McDonagh also referred to the decision of the Supreme Court in the case of *Scully v. D.P.P.* [2005] 1 IR 242. He referred to a passage from the judgment of Hardiman J. at p. 248 as follows:-

> "As in many other areas of law fundamental principles can be uncontroversially stated but their application to the myriad of circumstances which arise in practice can cause difficulty. The case of *Braddish* featured a very simple application of principle. There, a robbery was committed in a shop protected by video surveillance. A Garda viewed the video and formed the view (a) that the video showed the robbery in progress and (b) that the applicant was the person shown committing it. The applicant was therefore arrested and allegedly made an incriminating statement while in custody. When his solicitor sought the video tape he was told that it was no longer available as it had been given back to the owners 'after the accused admitted the crime'. These facts led to findings that real evidence could not be disposed of before the trial simply on the basis that the prosecution did not intend to rely on it; that in cases where the prosecution sought to rely upon a confession it should if possible be corroborated; and that the Gardaí were under a duty to preserve and (more controversially) to seek out all evidence having a bearing or a potential bearing on the issue of guilt or innocence.
>
> By the standards of later cases, however, the facts of Braddish present as exceptionally straight forward. In particular, it was the only case of which I am aware where it was positively stated by the Gardaí that the missing video tape was the factor which had led them to suspect the defendant in the first case: a Guard identified him from it. In this case and others the defendant is said to have fallen under suspicion for different reasons; 'confidential information from a previously reliable source' is said to have implicated Mr. Scully."

18. Thus Mr. McDonagh emphasised that the duty that exists is a duty to preserve real evidence. In this case the Gardaí never actually had the real evidence in their possession but that fact doesn't remove the underlying duty. He emphasised that the facts of this case are very similar to those in the *Braddish* case.

19. Mr. McDonagh then went on to deal with the issue of delay. He referred to a further passage from the judgment of Hardiman J. in

the *Scully* case at p. 251 where Hardiman J. looked at the question of delay in the context of the particular case in detail. Having referred in full to the passage from the judgment of Hardiman J. at p. 251- 252 under the heading 'Delay in Context' he argued that it was clear that delay was not an automatic bar to an application for prohibition.

20. Mr. McDonagh then referred again to a passage from that judgment at p. 253 in which Hardiman J. identified the principle in relation to the preservation of videos. He stated:-

> "In *Braddish v. Director of Public Prosecutions* [2001] 3 IR 127, it was emphasised that a video should not be destroyed or rendered unavailable by the Gardaí simply because a Garda has formed the view that it is of no use. The prosecution are fortunate that, in this case, the view which the Gardaí formed is independently corroborated and is unchallenged. But, in general, it seems both prudent and fair to preserve a video tape, the expense or inconvenience of doing so is minimal and the facts of another case might well lead to a different result following a decision to dispose of a video tape."

21. Mr. McDonagh then referred to a further lengthy passage from the judgment of Hardiman J. in the case of Scully under the heading the existence of a confession at p. 254 - 256 of his judgment. I do not propose to set out in full the passage referred to by Mr. McDonagh. In the course of that passage Hardiman J. quoted from the judgment in *Dunne v. Director of Public Prosecutions* [2002] ILRM 241 wherein it was stated:-

> "It is indisputable that certain cases where the sole evidence has been an alleged confession have given rise to justified concern. In light of this and of the statutory provision to which this concern has given rise, it is extraordinary that a very obvious means of obtaining independent evidence was as far as the evidence in this case goes, not availed of."

22. Having referred to that passage from the decision in *Dunne* [2002] 2 IR 305 at p. 320 Hardiman J. went on to say at p. 255:-

> "It is impossible to dissent from what the trial judge said about the relevance of an alleged inculpatory statement. I would, however, add that it may also be relevant to consider not only whether the statement relied upon has been contradicted but also whether there were also exculpatory statements and whether the exculpatory statement relied upon is corroborated in any way and whether the alleged statement had been itself videotaped."

23. Thus Mr. McDonagh argued that the existence of a confession is not such as to preclude the prosecuting authority from the duty to preserve real evidence.

24. Finally Mr. McDonagh referred to the judgment of Hardiman J. in Scully on the topic of eve of trial applications. Hardiman J. stated as follows:-

> "I entirely agree with the learned trial judge's strictures on the fact that this application was made, literally, on the eve of the trial. This is not the latest recorded application; in one of the reported cases (Bowes) the application was made on the morning of the trial. I would apply similar strictures to any application made in the immediate run up to the trial, for a number of reasons which I now summarise, not necessarily in order of importance. Firstly a case which has a trial date attributed to it is displacing another case which might have been listed for the same day, thereby causing additional stress, anxiety and possibly worse to the parties in the other case. Secondly inconvenience or worse is inevitably caused to witnesses when the trial date is vacated at the last moment. Thirdly a good deal of effort in ensuring that the case is ready to go on would be wasted if the date is lost. I would apply these strictures to the loss of a trial date regardless of which side brings it about. In the particular case of loss of an assigned trial date due to a very late application for judicial review the underlying reason will almost always be a failure to think seriously about the case until just before the date for which it is listed. I would not advocate an absolutely rigid attitude to such applications because experience shows that there can be circumstances which justify the delay. But if it is necessary to make a very late application of this sort I consider that the reasons for this necessity should be specifically addressed in the statement of grounds or the affidavit verifying it so that the court can consider whether in the exercise of its discretion it should grant a very late application for leave."

25. Having referred to this passage Mr. McDonagh reiterated the view that delay cannot be taken out of context and that this court should not deal with delay on its own as a preliminary issue.

26. Ms. McDonagh appeared on behalf of the second named respondent herein. In her submission she also referred to the decision of the Supreme Court in the case of Scully and to the judgment of Hardiman J. in that case. In the context of delay she also referred to that part of the judgment of the Supreme Court in which Hardiman J. stated at p. 252 as follows:-

> "Delay is significant not so much for it's bare length… but 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. To put this another way, all the defendant 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. D.P.P.* [1994] 2 IR 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 applicant's case did not at all engage with the facts provided in the initial statements in April 2003, but simply considered them as irrelevant. This omission represents a flight into unreality."

27. Having referred to that passage Mr. McDonagh argued that the only part of the applicant's case in which it could be said that there was an engagement with the evidence is contained in para. 5 of the first affidavit of Mr. Quinn and I quote in full from that affidavit:-

> "I say that as appears from the book of evidence and in particular the statements of Detective Garda Shane Davern and Garda Ciaran O'Neill, on foot of his alleged identification from CCTV footage purportedly recording a robbery at Movie Magic, Donaghmede, on 23rd March, 2004, the applicant was arrested by Garda Declan Maloney and conveyed to Santry Garda Station. I say that as appears from the book of evidence the applicant in the course of his detention is alleged to have made a full statement of admission in relation to the robbery. I say that it is this alleged statement of admission that is effectively the evidence or the principle evidence against the applicant in this case."

28. Miss McDonagh posed the question is it unfair for this applicant to face trial in the context of this particular case. Having posed the question, she says: No. It is not enough for an applicant to say "no video – no trial". It is necessary for the applicant to show

that there is a real risk of an unfair trial and as such she says that the failure to engage with the evidence in this case is such that there has been no demonstration on the part of the applicant that he faces a serious risk of an unfair trial.

29. Miss McDonagh in dealing with the issue of delay referred to the reason given for that delay in the supplemental affidavit of Mr. Quinn. She argued that inadvertence was not a sufficient reason for delay. In so doing she referred to the decision of the High Court in the case of *Connolly v. D.P.P. and the Judges of the Metropolitan District Court* (Unreported, 15th May, 2003) in which Finlay Geoghegan J. dealt with the issue of delay having regard to the provisions of Order 84 rule 21(1) of the Rules of the Superior Courts. That case related to inspection of a motor vehicle and the applicant's solicitor had been informed on 25th March, 2002, that the car had been returned to its owner and was not now available to the applicant for examination. The papers to move the application for judicial review appear to have been finalised on 26th April, 2002, and the application itself was not made until 1st July, 2002. It was submitted that in the absence of any evidence explaining the delay that the court could not exercise its discretion to extend the period under Order 84, rule 21(1). At p. 6 of the judgment Finlay Geoghegan J. stated as follows:-

> "Whilst it is true that the courts are slow to refuse to entertain an application for judicial review seeking to prevent a criminal trial where the allegation is that there is a serious risk of an unfair trial upon grounds of delay in bringing the application, on the facts of this case I am forced to conclude that the applicant has failed to apply for judicial review promptly and has not put forward any evidence to the court upon which such delay could be excused and the time extended. I am particularly influenced by the fact that it appears that both the statement of grounds and the grounding affidavit, which refer to a District Court hearing date of 5th July, 2002, were finalised and filed on 26th April, 2002 and no step was taken to apply to court until approximately two months later and within two weeks of the trial date. Further, that there is no explanation (other than in relation to one week) for such delay."

30. Finally Miss McDonagh referred to the dissenting judgment of Fennelly J. in the case of *Dunne v. D.P.P.* [2002] 2 IR 305 where Fennelly J. had dissented from the proposition of the majority that "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" which was referred to by Hardiman J. in the judgment in the Scully case at p. 250 and Hardiman J. then went on to quote from the judgment of Fennelly J. at p. 343 to 344 as follows:-

> "It represents a very significant new step in the law. The passage states that the Gardaí are under a duty to 'seek out and preserve all evidence having a bearing or potential bearing on the issue of guilt or innocence'. That is no doubt a reasonable statement of the duties of policemen in the performance of their work. It does not, however, necessarily follow that, where an accused person is in a position to show that the Gardaí have failed to seek evidence which would have had a potential bearing on the innocence of the accused, that will suffice to meet the test of a real and serious risk to a fair trial. On such an assumption, a trial will be prohibited, whenever a court can be persuaded that the Gardaí have failed to seek out any identifiable evidence which might even possibly tend to exonerate the accused. I cannot agree that our criminal law should go so far. It is difficult to say where the line will be drawn. Giving the increasing prevalence of closed circuit television in our towns, it is to be anticipated that there will be a rash of applications for prohibition wherever video evidence is not produced. Even where it does not cover the crime scene, why should it not be arguable that video recordings of activity in surrounding areas should be obtained. The danger is that there will develop a tendency to shift the focus of criminal prosecution onto the adequacy of the police investigation rather than the guilt or innocence of the accused."

31. Having referred to that passage Hardiman J. stated as follows:-

> "The apprehension of Fennelly J. in that paragraph is, of course, a real and serious one. If a defendant in criminal proceedings were entitled to force their discontinuance because he could demonstrate any shortcoming in the investigation whereby evidence which might, however theoretically lead to his exoneration was lost, that would be to alter the thrust of our criminal procedures in the direction of unreality and the frustration of justice."

32. On the basis of those passages Miss McDonagh argued that the onus is on the applicant to establish that there is a serious risk of an unfair trial as a result of the loss of the missing evidence.

33. In reply Mr. McDonagh made the point that criticism of the affidavits sworn by the applicant's solicitor herein does not outweigh the constitutional right of the client to a fair trial.

34. There are a number of matters which can clearly be stated in this case. Undoubtedly, the CCTV footage in this case was real evidence. It was as a result of viewing that evidence that the Gardaí arrested the applicant herein and another individual who has since pleaded guilty to the offence and has been sentenced. The Gardaí promptly sought a copy of the CCTV footage. They were given a disc which they understood to contain the evidence that was relevant. In fact the disc on which the CCTV footage should have been downloaded was, in fact, blank. This occurred through no fault of the Gardaí. Having identified the applicant he was arrested and made an inculpatory statement whilst in custody. By letter dated 30th July, 2004, the applicant's solicitor sought disclosure from the second named respondent. By letter dated 22nd November, 2004, the applicant's solicitor received by way of additional statements information setting out what had occurred to the CCTV footage. An indication was given in the Circuit Court on 18th January, 2005, that an application for judicial review was to be brought on behalf of the applicant herein. No steps were taken by or on behalf of the applicant until 10th June, 2005, some five days before the trial was due to proceed in respect of the charges against the applicant. It is in those circumstances that I have to consider the first question to be determined by me and that is whether or not the applicant is entitled to seek judicial review notwithstanding the delay in applying for judicial review.

35. Although the statement of opposition in this case raises a period of delay in seeking judicial review between 25th March, 2004, when the applicant was arrested and 30th July, 2004, when disclosure was sought, I am not of the view that in the context of this particular case that that delay was such as to preclude the applicant from seeking relief by way of judicial review. I know that there are cases in which the period after arrest and before the service of a book of evidence where a negative view has been taken by the courts in relation to such delay. However it was not a matter upon which great emphasis was put during the course of argument in this case. Further it does not appear to have been an unacceptable delay in the circumstances of this case.

36. The second named respondent also complained of the delay from the time when the applicant was told of the problem in respect of the CCTV footage, namely 22nd November, 2004, and the delay thereafter in seeking judicial review. That delay does appear to me to be more than unsatisfactory. This was an eve of trial application for judicial review. I have already referred to the passage from the judgment of Hardiman J. in the *Scully* case on eve of trial applications. Hardiman J. referred at length to the difficulties caused by such applications. In his affidavit, Detective Garda Shane Davern in para. 18 deposed to the inconvenience caused to the prosecuting Gardaí and the other witnesses referred to in the book of evidence. Naturally, the constitutional rights of an accused person are far

more important than the convenience or otherwise of either Garda witnesses or lay witnesses but nonetheless the reasons outlined by Hardiman J. for applying strictures to applications made in the run up to a trial are relevant. I would share the views of Hardiman J. that one cannot take an absolutely rigid attitude to eve of trial applications because there may be circumstances which justify the delay. In this case therefore it is necessary to look at the reasons given for the delay. That reason is set out at para. 6 of the supplemental affidavit of Mr. Quinn sworn herein. The explanation given was as referred to earlier that "through inadvertence, counsel for the applicant failed to bring the within prohibition proceedings within three months from the date when the grounds for the application first arose". I have to say that I am not satisfied that mere inadvertence in bringing an application can excuse the delay in making such application. If that were the case, there would be little basis for exercising the court's discretion to refuse an application on the grounds of delay. I should add that the fact that counsel's inadvertence apparently led to the delay in making the application for judicial review in this case does not take away from the responsibility of a solicitor to ensure that a prompt application for judicial review is made in accordance with the Rules of the Superior Courts. Equally, it should be noted that this was a case in which the Circuit Court was told on 18th January, 2005, that an application for judicial review was to be brought and it was on that basis that the court set a late trial date for the applicant to facilitate the bringing of the application for judicial review. Therefore, counsel, the solicitor and the applicant were all aware of the need to bring such proceedings in a timely manner. In those circumstances I see no basis upon which the court's discretion to extend the time within which to bring the application for judicial review should be exercised in favour of the applicant.

37. If I am wrong in my view in relation to the question of delay, I should proceed to deal with the merits of the application herein. Mr. McDonagh as I have said referred to the decision in the *Braddish* case and placed considerable emphasis on that case. As in that case, the applicant herein was alleged to have been involved in a robbery which was caught on CCTV footage. Also as in that case, the applicant herein made admissions following his arrest. Equally, in this case as in the *Braddish* case the CCTV footage is not available for the trial. Unlike this case however, the Gardaí in the *Braddish* case apparently disposed of the videotape footage before trial on the basis that the applicant in that case had made admissions. Clearly that is not the case in the present circumstances. Unlike the *Braddish* case, the Gardaí in the present case were relying on the CCTV footage and the same was an exhibit in the book of evidence. Undoubtedly the CCTV footage is real evidence of the alleged offence and is now no longer available to either the applicant or the second named respondent. In those circumstances, has the applicant herein established a serious risk of an unfair trial in the absence of that footage? I think the answer to that question has to be - no. This is not a case in which it has been suggested that there is a real issue as to the admissibility of the memorandum of interview furnished by the applicant to the Gardaí. It may well be that at the trial such memorandum of interview may be found to be inadmissible. However this is not like the situation in the *Braddish* case where it was clear that the confession in that case was hotly disputed. It is in that context that it appears to me that Ms. McDonagh is correct in her submission that the applicant herein has failed to engage with the evidence in this case. Looking at the overall situation herein it seems to me that this is a case in which leave has been sought to prohibit the trial by virtue of the happenstance that the CCTV footage is missing rather than an attempt to show that the applicant has been deprived of a fair trial by the absence of critical missing evidence. I feel that my view in this regard is supported by the fact that such an application was brought only on the eve of trial and accordingly it seems to me to have the characteristics of an application made for the purpose of "tripping up the investigators in discovery of evidence" as described by Hardiman J. in the Scully case. In coming to this view I am influenced by the fact that the applicant herein made admissions albeit at this point in time they can only be regarded as alleged admissions and secondly by the fact that if there was a serious risk of an unfair trial by reason of the missing evidence in this case, then I have little doubt that an application for judicial review would not have been derailed by mere inadvertence. In the circumstances of this case, I have come to the view that the application herein was somewhat opportunistic. In all the circumstances I am refusing this application.