Neutral Citation Number: [2009] IEHC 347

THE HIGH COURT

2008 416 JR

BETWEEN:

JASON KEARNEY

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

Judgment of Mr. Justice Hedigan, delivered on the 15th day of July, 2009

1. The applicant in the present case is facing two counts of dangerous driving contrary to s. 53(1) and s. 53(2)(a) of the Road Traffic Act 1961 ('the 1961 Act') before the Circuit Criminal Court, arising out of an incident on the 31st of December, 2006.

2. The respondent is the authority responsible for the prosecution of criminal offences in Ireland. His statutory authority to carry out this function is derived from the Prosecution of Offences Act 1974.

3. The applicant is seeking the following relief by way of judicial review:-

(a) An order of prohibition, or in the alternative an injunction, restraining the trial of the applicant in the Circuit Criminal Court in respect of the aforementioned charges; and

(b) A declaration that the aforementioned charges have been brought in breach of the applicant's right to a trial in due course of law and in breach of the respondent's duty at common law to seek out and preserve evidence relevant to the lawful disposal of criminal proceedings brought against the applicant.

I. Factual and Procedural Background

4. On the 31st of December, 2006, the applicant was driving his vehicle at Philipstown, Hackballcross, County Louth when he collided with another vehicle containing three passengers, two male and one female. The female and one of the males were seriously injured in the collision while the other male also sustained significant physical trauma. The applicant was relatively unharmed. He was arrested at the scene by Garda Allan Dempsey on suspicion of drink driving and conveyed to Dundalk Garda Station. He refused to provide a specimen of breath and was charged with offences contrary to s. 13(1)(a) and s. 13(2) of the Road Traffic Act 1994 ('the 1994 Act').

5. The scene of the collision was preserved for two hours in order to facilitate a full Garda inspection of the area. However, no specific forensic examination was carried out at that time. The applicant's vehicle was seized as Garda Dempsey suspected that it might not have been roadworthy owing to a perceived baldness of the tyres. No such seizure was performed on the other vehicle, although both were initially towed to Oriel Garage in Dundalk. On the 3rd of January, 2007, the applicant's vehicle was examined thoroughly at that garage by the Garda Public Service Vehicles Inspectorate and no faults were found in the resulting report.

6. On the 8th of January, 2007, the applicant's solicitor sent a standard form letter to the Superintendent at Dundalk Garda Station seeking disclosure of evidence relating to the incident and requesting the preservation of any evidence as may be relied upon by the prosecution in future criminal proceedings.

7. On the 10th of January, 2007, the applicant first appeared in Dundalk District Court in connection with the charges under s. 13(1)(a) and s. 13(2) of the 1994 Act. The matter was adjourned to the 4th of April, 2007. Garda Dempsey asked him whether he wished to make a statement in relation to the collision. Having taken advice from his solicitor, the applicant declined to do so.

8. On the 11th of January, 2007, the female passenger who had been in the vehicle that had collided with the applicant's died as a result of peritonitis caused by a blunt abdominal injury. On the 18th of January, 2007, her son informed Garda Dempsey that he had arranged for the vehicle to be removed from Oriel Garage and scrapped two weeks previously, in keeping with his mother's wishes.

9. A full forensic examination of the scene of the collision was ultimately carried out on the 7th of April, 2007. On the 27th of May, 2007, the applicant visited Oriel Garage with a view to retrieving the alloy wheels from his vehicle. He informed the staff at the garage that he had no interest in any other part of the vehicle. As the wheels had been removed from the car and could not be located, the applicant was given a cheque for their value instead.

10. On the 17th of July, 2007, the applicant's solicitor again wrote to the Superintendent of Dundalk Garda Station, in a standard form letter, seeking disclosure and preservation of all relevant evidence. A further identical request was sent on the 28th of November, 2007.

11. On the 23rd of October, 2007, the applicant was charged with dangerous driving, causing the death of the female passenger from the collision. On the 12th of December, 2007, the applicant was charged with dangerous driving, causing serious injury to one of the male passengers. The applicant was then sent forward, on the 16th of January, 2008, for trial at Dundalk Circuit Criminal Court in respect of both of these charges.

12. On the 13th of February, 2008, the applicant's solicitor specifically sought, for the first time, to arrange an inspection of the two vehicles involved in the collision. By reply dated the 20th of February, 2008, the applicant's solicitor was informed that the vehicle driven by the injured parties was no longer available for inspection as it had been returned to its owners.

13. On the 28th of February, 2008, a consultant engineer retained on behalf of the applicant attended Dundalk Garda Station with a view to inspecting the applicant's vehicle, which was still in Garda possession. The vehicle, however, was not available for inspection and its whereabouts were unknown by the Gardaí at the station.

14. On the 7th of March, 2008, the applicant's solicitor was contacted by the Gardaí to confirm that the applicant's vehicle would be made available for inspection. By letter dated the 13th of March, 2008, the applicant's solicitor sought to confirm a time and date for such inspection but no response was received. Further efforts in this regard were made by the applicant's solicitor on the 18th, 19th, 25th, 27th and 28th of March, 2008.

15. The applicant's solicitor was ultimately contacted by the investigating Gardaí on the 29th of March, 2008, who confirmed that, contrary to previous suggestions, the vehicle would not be available for inspection. On the 1st of Apri,l 2008, a representative from Oriel Garage confirmed to the Gardaí that the vehicle had in fact been removed and scrapped approximately 6 months after the collision. The director of Oriel Garage maintains before this Court that this procedure was performed with appropriate authority from the investigating Gardaí, although he is unable to specifically identify which member of An Garda Síochána gave permission to do so. Arising out of this confusion, the Chief State Solicitor's Office referred a series of queries to the Gardaí at Dundalk Garda Station, seeking to determine what had occurred in relation to the vehicle.

16. On the 14th of April, 2008, McGovern J. in the High Court refused leave to apply by way of judicial review. This refusal was successfully appealed to the Supreme Court, however, and it is on foot of the order of that court that the applicant now seeks relief.

II. The Submissions of the Parties

17. The applicant contends that the Gardaí have, in the present case, failed to observe their duty, arising out of their unique investigative role, to seek out and preserve all evidence which is capable of having a bearing on his guilt or innocence. He argues that as a result of this failure, there is a real and substantial risk that he would be unable to receive a fair trial in respect of the charges against him. In this regard, the applicant points specifically to two aspects of the prosecution case which will now, in his submission, be immune from challenge: first, the suggestion that the point of impact of the vehicles showed that the applicant had been driving on the incorrect side of the road; and second, the contention that the applicant's vehicle was free from any defect which might have had a bearing on the collision. He contends that the absence of potentially exculpatory evidence in respect of each of these points amounts to specific prejudice which can only be avoided by an order of prohibition from this Court.

18. The respondent rejects any suggestion that the Gardaí have failed in their duty to preserve the evidence in the case. He argues that there is no reason for this Court to suspect that a further examination of the vehicle, carried out on behalf of the applicant, would have been capable of assisting him in his defence. On this basis, the respondent contends that there is no risk of the applicant being subjected to an unfair trial.

19. The respondent further submits that the applicant has failed to meaningfully engage with the evidence in the case. He argues that the mere suggestion of theoretically possible alternative explanations for the collision cannot provide grounds for prohibition, particularly in circumstances where substantial evidence of the applicant's culpability exists. In this regard, the respondent points specifically to the existence of eye-witness testimony and the photographic evidence obtained at the scene of the collision, as well as the detailed report of the Public Service Vehicles inspector. The respondent emphasises that it would have been open to the applicant to specifically seek an inspection of his vehicle prior to February 2008, however he failed to do so despite being in contact with Oriel Garage in respect of the alloy wheels. This, in the respondent's submission, leads to the conclusion that the applicant did not genuinely believe that any evidence of utility to him could be obtained from such an inspection

III. The Decision of the Court

20. Over the last number of years, the Superior Courts have had to consider a number of cases in which individuals charged with criminal offences have sought relief by way of judicial review because the Gardaí have lost or destroyed evidence, or entrusted items of evidence to third parties who have themselves irretrievably lost or destroyed them. Such cases include, but are not limited to: *Braddish v. DPP* [2001] 3 I.R .127; *Dunne v. DPP* [2002] 3 I.R. 305; *Bowes v. DPP* [2003] 2 I.R. 25; *McGrath v. DPP* [2003] 2 I.R. 25; *Scully v. DPP* [2005] 1 I.R. 242; *McFarlane v. DPP* [2008] IESC 7; *Ludlow v. DPP* [2008] IESC 54; and *Savage v. DPP* [2008] IESC 39.

21. Emerging from this lengthy strand of authorities is the principle that it is the duty of the prosecution authorities, in particular An Garda Síochána, to preserve and retain all evidence which comes into their possession and which is capable of having a bearing on the guilt or innocence of the accused. This duty holds an important role within our criminal process and stems from the unique investigative powers of the police. Despite the abundance of recent authorities, the principle is not a novel one and has existed since at least the end of the 19th Century. In *Dillon v. O'Brien and Davis* (1887) 20 L.R. Ir 30, the applicants sought the return of certain articles which they asserted were material to their defence in a criminal trial. Palles C.B. granted the relief sought and stated as follows at p.317:-

> "But the interest of the State in the person charged being brought to trial in due course necessarily extends […] to the preservation of material evidence of his guilt or innocence as to his custody for the purpose of trial. His custody is of no value if the law is powerless to prevent the extraction or destruction of this evidence, without which a trial would be no more than an empty form."

22. The obligation to seek out and preserve is not without qualification, however, and is subject to a number of clear

caveats. The first of these is that the missing evidence in question must be such as to give rise to a real possibility that, in its absence, the accused will be unable to advance a point material to his defence. The mere disposal of items of evidence, which do not possess any, or any sufficient, nexus with the case that the accused seeks to make, will not amount to a breach of duty by the Gardaí. In *Dunne*, Hardiman J. stated at p.323:-

> "The emphasis […] on the need for the obligation to seek out, and indeed to preserve, evidence to be *reasonably* interpreted requires, I hope, that no remote, theoretical or fanciful possibility will lead to the prohibition of a trial." (Emphasis in original)

23. The second reservation, which must be added to the general duty, is that the Gardaí must only do what is reasonably practicable in seeking to identify and preserve pieces of material evidence. This much is clear from the decision of the Supreme Court in *Braddish*. In that case, Hardiman J. considered the ambit of the duty and made the following instructive remarks:-

> "It must be recalled that, in the words of Lynch J., in *Murphy v. Director of Public Prosecutions* [1989] ILRM 71, the duty to preserve evidence is to do so 'so far as is necessary and practicable'. A duty so qualified cannot be precisely or exhaustively defined in words of general application. Certainly, it cannot be interpreted as requiring the gardaí to engage in disproportionate commitment of manpower or resources in an exhaustive search for every conceivable kind of evidence. The duty must be interpreted realistically on the facts of each case."

24. The final applicable caveat is that cases such as this one must be determined in light of their own particular circumstances. It is necessary for the court to determine what level of intervention is required to protect due process in light of the specific facts. This much is clear from the decision of Hardiman J. in *Braddish*, cited above, and also from the decision of the same judge in *Ludlow.*

25. In addition to the foregoing, any application for an order for prohibition is subject to the general limitations laid down by Finlay C.J. in *Z v. DPP* [1994] 2 I.R. 476. In that case, the learned Chief Justice stated the following:-

> "[T]he onus of 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 […] [W]here 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."

26. The task which befalls the court, therefore, is to consider whether there is a substantial risk of an unfair trial by virtue of the accused's alleged inability to challenge the evidence to the effect that his vehicle was free from defect and that the point of impact showed that he had been driving on the wrong side of the road. In respect of both of these points, I am of the opinion that the applicant's arguments are "remote, theoretical or fanciful" in the manner contemplated by Hardiman J. in *Dunne*.

27. There is no reason on the evidence to suspect that the applicant's car might have been so defective as to have materially contributed to the collision. Garda Dempsey's initial suspicion that the tyres may have been bald has been conclusively rebutted by the detailed report of the Public Service Vehicles inspector. In addition to this, there is an abundance of alternative evidence to suggest that the sole cause of the collision was the applicant's erratic driving, as contributed to by his state of intoxication.

28. As regards the issue of the point of impact, I am satisfied that there is nothing which might reasonably have been gleaned from a further inspection of the vehicle by a representative of the applicant. The photographs and other evidence obtained at the scene of the collision, in addition to the report of the Public Service Vehicles inspector, are clearly dispositive of the matter. Mere speculation as to what another engineer *might* have surmised from an inspection of the vehicle is insufficient to persuade the court that the absence of such theoretically possible evidence causes a risk of an unfair trial.

29. I am supported in my conclusions to the effect that the applicant's arguments are insubstantial by the fact that he himself, through the medium of his solicitor, did not see fit to request an inspection of the vehicle until more than one year after the collision. This inordinate delay, to my mind, amounts to a clear indication that the issues of the point of impact and the state of the vehicle were not regarded as material by the applicant and his legal team. Indeed, it seems that the only efforts which were made to contact Oriel Garage occurred with a view to retrieving the valuable alloy wheels.

IV. Conclusion

30. The general principles relating to the duty of the Gardaí to seek out and preserve potentially exculpatory evidence are clear and unambiguous. These must be applied to each application for the prohibition of a criminal trial in light of the circumstances of the particular case. Here, both of the points which the applicant alleges he will be unable to make, as a result of the scrapping of his vehicle, are of a purely theoretical or fanciful nature. Their lack of substance is borne out by the failure of the applicant to seek inspection of the vehicle until more than one year after the collision.

31. I am therefore of the opinion that there would be no real or substantial risk of injustice were the trial of the applicant to proceed in the usual manner. In the result, I will refuse the relief sought.