

THE HIGH COURT**JUDICIAL REVIEW****2004 No. 335 J.R.****BETWEEN****CIARAN MATTHEWS****APPLICANT****AND
THE DIRECTOR OF PUBLIC PROSECUTIONS****RESPONDENT****AND****2004 No. 353 J.R.****BETWEEN****DAVID MATTHEWS****PLAINTIFF****AND
THE DIRECTOR OF PUBLIC PROSECUTIONS****DEFENDANT****Judgment of Mr. Justice John MacMenamin dated the 14th day of December, 2007.**

1. The applicants seek prohibition by way of judicial review of a criminal trial currently pending before the Circuit Criminal Court, Eastern Circuit, sitting at Dundalk wherein they are charged with assault of one Andrew McAfee, causing him harm contrary to s. 3 of the Non Fatal Offences Against the Person Act, 1997.
2. The matter was listed for trial at Dundalk Circuit Court in March, 2004 when it was adjourned by His Honour Judge Raymond Groarke to enable the applicants to make this application.
3. The said assaults are said to have occurred on 16th June, 2002.
4. At approximately 11 p.m. Andrew McAfee is alleged to have been assaulted close to the middle of Park Street, Dundalk, County Louth. It is stated that he was seen being struck on the head by two persons as he lay in the street. Two witnesses, Raymond Coburn and Leo Meenan, are alleged to have witnessed the assault. Both men are doormen/bouncers in licensed premises adjacent to where the incident is alleged to have occurred.
5. The first of these public houses is called "Moe's". On the opposite side there is a public house called "Harvey's". The matter was investigated by a then member of An Garda Síochána, Mr. Peter McHugh. He stated that on the night in question he spoke to Raymond Coburn and Leo Meenan but did not note down their remarks. Subsequent to this conversation he arrested David Matthews, the second named applicant, who is a brother of Ciaran Matthews, the first named applicant.
6. David Matthews was interviewed by Garda McHugh. In the course of this interview contained in the Book of Evidence he stated that he was in another pub, Courtney's, during the course of the evening and then went across to Harvey's pub. He admitted that he was in a fight in Harvey's pub with one Andy Mackin. However, he denied being in a fight with anyone else that night. He stated that he was ultimately put out of Harvey's pub by the bouncers.
7. Ciaran Matthews in his statement stated that he too had been in Harvey's pub with his brother. He used to work in Courtney's pub. He stated that his brother David was fighting with Andy Mackin. Ultimately they were put out of the pub by bouncers. Ciaran Matthews describes the fight between his brother and Andy Mackin starting in the pub and finishing outside on the street. He states that he saw David fighting with a fellow outside Moe's pub. He did not know who this fellow was and would not recognise him again. He denied fighting with anyone himself or kicking or hitting anyone. He timed the incident as having occurred at approximately 10.30 p.m.
8. In the course of his statement, Leo Meenan who worked as bouncer in Harvey's pub stated that they had been asked to put out a couple of fellows who were causing trouble in the bar. He identified those persons as being "Stick" Matthews and his brother. He did not know their first names although he knew "Stick" Matthews because he worked in Courtney's pub. Mr. Meenan describes "Stick" Matthews, unprovoked, punching Anto Mackin in the face as he was being put out of the pub. He eventually put the two Matthews brothers out onto the street. He had "Stick" Matthews pinned up against the wall and had him calmed down. This Mr. Matthews then tried to get back into the pub again and he pushed him and his brother out onto the street. He was shouting abuse at him and threatening to get the IRA after them. He was standing outside Moe's pub which was directly across the road from him.
9. After a couple of minutes, Mr. Meenan alleges that he looked across to see where the two Matthews brothers were. He states that he could see the two men standing over a fellow in the middle of the road. This man was kneeling on the ground. He then saw "Stick" Matthews kicking this man in the head. He had no chance to protect himself after getting the kick and he collapsed onto the ground. Mr. Meenan states that it looked to him like a totally unprovoked attack. He describes the doorman from Moe's, Raymond Coburn, going over to help the man on the ground. When he was picked up he immediately recognised him as Andrew McAfee, who was totally dazed and his left eye was badly swollen.
10. Raymond Coburn worked in Moe's public house as doorman. At approximately 11 p.m. he alleges that he saw doormen from Harvey's pub putting a couple of fellows out of their pub. A row started on the street with those fellows and a few other persons. He recognised one of the lads who were put out as Ciaran Matthews. He worked in Courtney's pub as a barman. His brother was with him. He could see Andrew McAfee standing against the front window of Harvey's pub. He went over to where the row was taking place and tried to protect the fellow that had been kicked on the ground. The two Matthews brothers were allegedly kicking the man on the ground. He did not know who he was. Mr. Coburn states that when Andrew McAfee went over to help the man on the ground the two Matthews brothers and a third man turned on him and punched him to the ground. He states he could clearly see Ciaran Matthews and his brother kicking Andrew McAfee in the head while he was on the ground, at a time when he was totally defenceless. He states that Mr. McAfee did not hit anyone before he was attacked and did not get a chance to defend himself.
11. Mr. Coburn says he and another doorman, Sean Jordan, went over to help the victim because allegedly he was being given an "awful kicking". When they ran over the assailants scattered. He says they brought the victim of the assault to the side alley at

Harvey's pub. Mr. Coburn states that he pointed out the two Matthews to members of the Gardaí when they arrived at the scene. Mr. McAfee's left eye was badly cut and he was totally dazed. Mr. Coburn added at the end of his statement that the fight allegedly happened in the middle of the street, just a little down from the pub.

12. In the course of his statement in the book of evidence, Garda McHugh points out that Raymond Coburn had been mistaken in naming but not identifying one of the suspects. The person that he identified to him as the alleged assailant was not Ciaran Matthews but David Matthews.

13. A third person stated to have been involved in the incident, Sean Jordan, declined to make a statement.

14. Notice to cross-examine was served on Mr. Peter McHugh, now no longer a member of An Garda Síochána. In evidence he described speaking to Mr. Coburn and Mr. Meenan on the evening of the incident but did not note down what they said. He arrested the applicant, David Matthews, and brought him to Dundalk garda station by way of a squad car. The witness accepted that the applicant, David Matthews, was detained under s. 4 and that from that time onwards a full garda investigation was in progress commencing as and from 17th June, 2002.

Some days after the incident he went on leave. He was aware that there may have been CCTV coverage; however, he did not obtain any of this material at that time. He testified that his reason was he was unsure whether or not the victim wished to make a complaint. By affidavit sworn in the proceedings he said that shortly after the assault he spoke with Mr. McAfee at the hospital in Dundalk where he had been brought for treatment. At that point, while Mr. McAfee described the attack to him, he was unsure if he wished to make a formal complaint. Mr. McHugh gave him his business card. The following day he visited him again but he was still unsure if he wished to make a complaint. Peter McHugh deposed that on at least five occasions during the following two months he made contact with Mr. McAfee but on all occasions he was unsure if he wished to make a complaint. He finally made a complaint on 24th August, 2002. Within a few days of receiving this complaint but two months after the incident, Mr. McHugh visited the two licensed premises, 'Moe's' and 'Harvey's' to ascertain if there was any video footage available in relation to the assault.

15. He says he discovered there was no video footage because the incident had occurred in the middle of the street and this area was not covered by the video camera attached to either of the licensed premises in question. He did not say whether any video evidence had become unavailable or been lost in the two months. He states that the camera attached to Harvey's premises covered the area surrounding the door to the premises but did not extend to the middle of the street where the assault occurred. The camera attached to Moe's premises faced southwards and therefore pointed southwards from the location in which the assault occurred. Therefore there was no video footage available, and therefore none to be preserved. He asserts that all reasonable efforts were made by him to secure any footage that might have been reasonable.

16. Peter McHugh states that, while there is mention in the affidavit sworn by Frank McDonald, solicitor for Ciaran Matthews, of an incident some time earlier on the same night of 16th June, 2002 when the applicant and his brother David Matthews were ejected from Harvey's, no complaint was made to the Gardaí in relation to this incident and therefore no question arose of seeking to have any video tape preserved.

17. The date of the alleged offence was 16th June, 2002. The two accused received the statement of charges and book of evidence on 18th November, 2003. They were returned for trial on 17th December, 2003. Prior to the return for trial, Messrs. MacGuill & Co., Solicitors for David Matthews sought details of any video evidence. This was by letter and was dated either 31st July, 2003 or 12th August, 2003. There is uncertainty as to the actual date but it is not denied the letter was sent.

18. A further letter was sent on 9th January, 2004. No reply was received to the first letter.

19. A request for video evidence on behalf of Ciaran Matthews was made on 23rd March, 2004 and responded to in April, 2004 to the effect that the video monitors of Harvey's or Moe's public houses did not cover the area of the street that the incident occurred.

20. I do not consider that the responses which were furnished by An Garda Síochána were as full as they might have been. At a time when the *Braddish* and *Dunne* decisions were well known and publicised, there appears to have been no response to the letter of 31st July or 12th August, 2003 from MacGuill & Co. A further letter sent on 9th January, 2004 was responded to on 28th of that month, stating that there was no video evidence and that the security cameras outside both Harvey's and Moe's bars covered only the immediate vicinity of the footpaths.

21. In a letter of 5th May, 2004 to Messrs. Dermot Lavery & Co., by then acting for David Matthews in place of MacGuill & Co., Superintendent McGee stated that Garda McHugh had spoken to the management of both premises and had also viewed the monitors to verify the position. He wrote that as a result, there was no video footage of the alleged incident on the night in question.

22. It would have been far preferable if the letters from An Garda Síochána had more fully explained the situation and also dealt with the reason why no video evidence had been sought or obtained on the night of the incident or in the days immediately following.

23. If such a letter had fully set out what had transpired it is not unreasonable to assume that the applicants might have thought twice before initiating judicial review proceedings. The fact that Garda McHugh had asked the victim of the assault on a number of occasions whether he wished to initiate a complaint would certainly have been a relevant consideration. The terms of the responses created confusion, and, perhaps, suspicion.

24. The court has been informed that ultimately the alleged victim has furnished a statement to An Garda Síochána indicating for reasons not explained to the court that he does not wish for the trial to proceed.

25. However, the director has determined that prosecution should proceed.

26. Counsel on behalf of David Matthews, Mr. Roderick O'Hanlon S.C., and Mr. Derek Kenneally, S.C. (on behalf of Ciaran Matthews) in cross-examination elicited further additional evidence from Peter McHugh. The night in question, that of 16th June, 2002, is of particular importance. It was the night when Ireland played Spain in the World Cup. Thus, per contra any impression which might have been formed from the book of evidence, the night in question was one of the busiest of the year and both the public houses, and the streets outside in Dundalk were extremely crowded. It was pointed out that Garda McHugh accepted that the assault was such that it merited a full garda investigation, which was initiated on 17th June, 2002. Mr. McHugh states that he visited the monitor room of Harvey's but not the monitor room of Moe's public house. However, he said in evidence that he was aware of the angle or projection of the camera from Moe's public house from experience in other cases, and that the cameras on Harvey's projected only outside on the footpath. He was not specifically aware of the nature of the lenses on the cameras or aware of whether they were wide-angle

lenses.

27. The witness accepted that Anthony Mackin was a brother of Gerard Mackin, the manager of Harvey's public house, and that there was a family connection between the ownership or management of Courtney's public house and Harvey's public house.

28. Counsel on behalf of the applicants submit that in the context of a full garda investigation video evidence from both public houses should have been obtained within a number of days after the incident itself and not when the complaint was made months later; that there were conflicts between the evidence of Mr. Coburn and Mr. Meenan as to the number of persons involved; the extent of the involvement of the two applicants; the extent to which they engaged (if at all) in the assault, in such circumstances it would have been necessary for the purposes of the investigation to obtain the video evidence. Particularly so, it was suggested, as there might have been a conflict of interest between persons having charge of the video evidence (that is to say the bouncers or management of the public houses) and that of the applicants as potentially accused persons. The evidence in this issue goes no further.

29. More than four and a half years after the incident, on 13th November, 2007, Mr. Joe Osborne, Consulting Engineer, swore an affidavit in these proceedings on behalf of the applicants. He states that he was instructed to inspect the premises at Harvey's public house (now known alternatively as Vicars Night Club) and in particular was asked to note the position of the security cameras there and the area which they are "likely to cover". Mr. Osborne carried out a survey of the premises on 31st October, 2007. It consisted of an external inspection only of the night club and adjoining street. He took a number of photographs of the premises and prepared a report. Mr. Osborne states that the cameras are mounted ten to twelve feet above street level and appear to be tilted towards the frontage at sensible angles in order to take in the full frontage. However, he states, the cameras have wide-angle lenses. When in use and mounted, at what appears to be sensible angles, the cameras should, he claims, cover the entire street width and very long vistas up and down Park Street. The footpath outside Harvey's has a width of 13 ft. and the street itself has an additional width of 21 ft.

30. In the course of an affidavit in these proceedings, Frank McDonald, solicitor for Ciaran Matthews, states that the letter of 7th April, 2004 from Superintendent McGee advising (i) that the video monitors of Harvey's and Moe's did not cover the area of the street that that incident occurred in and (ii) that they were set only to cover the area of the footpath was the first time that such a claim had been made by the Gardaí in a process of disclosure going back to July, 2003. When the matter was raised before the learned Circuit Court judge no such assertion had been made on behalf of the prosecution. Mr. McDonald states that the notification more latterly made was a belated and incomplete attempt by An Garda Síochána to minimise the impact of the failure to properly or adequately investigate the alleged incident or to seek out and preserve evidence having a bearing of guilt of the applicants. This averment is certainly relevant with regard to whether it was justifiable to initiate these proceedings.

The law

31. In considering the issues herein I have had regard to the following judgments, namely (in chronological order) *Murphy v. The D.P.P.* [1999] I.L.R.M. 71, Lynch J.; *Braddish v. the Director of Public Prosecutions* [2001] 3 I.R. 127; *Dunne v. The Director of Public Prosecutions* [2002] 2 I.R. 305; *Bowes & McGrath v. the D.P.P.* [2003] 2 I.R. 25; *Scully v. The D.P.P.* [2005] 1 I.R. 242; *McKeown v. The D.P.P.* the Supreme Court, Unreported, (McCracken J.), 9th April, 2003; *Ludlow v. The D.P.P. the High Court*, Unreported, (Dunne J.), 16th July, 2005; *Connors v. Director of Public Prosecutions & Anor.* the High Court, Unreported, (O'Neill J.), 28th February, 2006; *McGrath v. Director of Public Prosecutions*, 23rd February, 2006; *McFarlane v. The D.P.P.* the Supreme Court, Unreported, 7th March, 2006, and more recently, *R.V. v. Director of Public Prosecutions*, the High Court, Unreported, MacMenamin J., delivered 31st July, 2007.

32. With reference to the principles outlined in these judgments the following points are of relevance here.

- (1) This is not a case where the Gardaí had in their possession material of an evidential value and disposed of or lost it.
- (2) There is no suggestion of any delay on the part of the applicants in seeking the material in question in the statement of opposition or in the submissions of the D.P.P.
- (3) There is no suggestion whatever of *mala fides* in the nature of the request. To the contrary, I am satisfied that all of the solicitors involved made requests entirely bona fide and in the proper performance of their duties towards their respective clients.
- (4) No request was made for the video evidence in the day or two after the incident, despite the fact that it was known that a serious offence had been committed.
- (5) *Prima facie*, there is evidence that there was some conflict of evidence as to the number of persons involved in the incident as potential perpetrators and the name of one of the applicants, that is to say David Matthews..
- (6) The parameters of the case appear to involve (i) an incident commencing inside the public house involving the ejecting of both of the applicants, (ii) an alleged unprovoked assault inside that public house and then (iii) the continuance of the fracas out into the middle of the road between the two public houses.

33. The actual principles applicable in cases of this type are now well settled.

34. They may be summarised, as they were by O'Neill J. in McGrath as follows: first, there is a duty on the Gardaí where it is reasonable and practical to do so to seek out and preserve evidence that bears on the guilt or innocence of an accused person; second, an applicant who is seeking an order for prohibition must establish firstly that there has been a breach of aforementioned duty on the part of the Gardaí and, a real, substantial or serious risk that the absence of the evidence not sought or preserved in itself creates a real risk that the applicant cannot get a fair trial in the absence of such evidence; third, proceedings of this kind are not a form of disciplinary tribunal on the conduct of the Gardaí: ultimately, the real issue is whether or not the applicant cannot get a fair trial because of the absence of the evidence in question.

35. In the instant case I am satisfied that there was a full investigation in being from in or about 17th June, 2002. It follows that part of such investigation could, and should have involved the obtaining of video evidence from both Harvey's and Moe's in a prompt and appropriate manner. This was not done. I accept that there is an explanation which has been tendered, that is to say that the victim on not one but a number of occasions was unsure as to whether or not he wished to make a complaint and that this was not resolved until 24th August, 2002. Nonetheless, information which was available to the Garda Síochána as and from 16th/17th June, 2002 was that a serious assault had been committed. The obtaining of relevant video evidence fell within the realm of material evidence foreseeably necessary for the investigation of this serious offence, whether or not the victim ultimately decided to make a complaint.

As is clear, the fact that the alleged victim has withdrawn his complaint has not been a deterrent to the continuation of this prosecution. Consequently the reason which has been tendered to the court as an explanation for failing to obtain the video evidence lacks substance. It is not the victim but the director who determines whether a prosecution should proceed.

36. In approaching the matter in this dilatory way it appears that members of the Garda Síochána had insufficient regard to material which might have assisted the defence and allowed the interests of the complainant to supervene over the proper investigation of a criminal offence.

37. As has been pointed out, repeatedly, nothing could be of greater importance than visual recordings of the actual occurrence of the crime, the alleged scene or the events immediately following or preceding it. It goes without saying that a recording of these events would be of great importance in the investigation of a criminal offence and ultimately in the trial of a person in respect of a charge arising out of these events.

38. Moreover, the entire basis or rationale for the failure to obtain this material is undermined by the fact that within a number of days after the complaint was actually received Mr. McHugh did actually go to seek this video material, prior to any request from the applicants' solicitors. This was not a course of action which should have been deferred until that time. I am satisfied, therefore, that there was a failure of duty on the part of An Garda Síochána to seek out and preserve evidence that bears on the guilt or innocence of the accused.

39. It is now necessary to consider the next facet of the test which is whether there is a real and substantial risk of an unfair trial by reason of the absence of the video material. Here it is necessary to re-focus on the evidential parameters of the case having regard to the principles identified in the authorities.

40. To summarise the evidence: relevant witnesses are first, the victim, Andrew McAfee, who remembers going out of Harvey's pub and thereafter can remember nothing else until he woke up in the ambulance. He did not see who or what hit him. The evidence of Leo Meenan, the doorman at Harvey's pub, has been described earlier as was that of Raymond Coburn, a doorman at Moe's public house. Former Garda McHugh describes being approached by Mr. Meenan who stated that he had witnessed the assault and pointed out a man stated to be "Stick" Matthews. The identification of two men, brothers, one of whom worked in Courtney's pub named Ciaran Matthews, was made by Mr. Coburn. The misnaming of the applicant has been described.

41. Ciaran Matthews describes being inside Harvey's public house with his brother David who was fighting with a man called Andy Mackin. Thereafter they were put out of the pub. He states that the fight started in the pub and finished out on the street. He saw David fighting with a fellow outside Moe's pub. He did not know who this fellow was and would not recognise him again. He denied fighting with anyone on the night in question. The memo of interview with the applicant, David Matthews has been described earlier.

42. However, I do not consider that there has been satisfactory evidence in relation to the following matters:

1. Any continuing nexus of events between what occurred inside Harvey's pub and what allegedly occurred outside where two separate persons were apparently involved in violent incidents with the applicant, David Matthews.
2. Whether there was any nexus between the alleged witnesses, Leo Meenan and Raymond Coburn and the incidents alleged to have occurred inside, but then outside Harvey's public house. The evidence does not establish they were all part of the same incident.
3. Mr. Osborne's evidence dealt with observations which he made in October, 2007. The court has not been informed as to whether there has been any alteration in the security or camera arrangements in the public house between the time of the incident (2002) and the time of Mr. Osborne's observations, nor has the court been informed whether any effort was made to establish whether there had been such alteration.
4. Mr. Osborne's observations consisted only of an external observation of the security cameras outside Harvey's/Vicars. He asserts on the basis of this observation only that the security angles which he observed in 2007 have wide-angle lenses. He opines that the cameras should cover the entire street width and very long vistas up and down Park Street. It is not established when these cameras were installed. More directly, I do not consider that the external observation of a camera lens is sufficient to discharge the onus of proof which devolves upon the applicants when, surely, inspection of the monitoring devices and checking the continuity of evidence would have provided a clear answer to a question which Mr. Osborne states as little more than a hypothesis, that is the range of coverage of the cameras if the same cameras were installed in 2002.
5. Even if the external cameras were in operation, the assault occurred at a time when, as was pointed out by counsel, the street in question was "littered with people" on what was one of the busiest nights of that year, at a time between 10.30 and 11 o'clock. Thus, it is not established that even had the cameras operated within the relevant field of vision, they would, as a matter of probability have established evidence tending to exculpate the accused or have a bearing on their guilt or innocence.

43. Mr. O'Hanlon has specifically drawn my attention to that part of the judgment of Lynch J. in *Murphy* where, having dealt with the disposal of a stolen car without allowing for a forensic examination, he said:

"It may well be that nothing would have been discovered by the requested forensic inspection, but the applicant has been deprived of the reasonable opportunity of rebutting the evidence proffered against him. It is also clear that there is no way in which this loss to the applicant of possibly corroborative evidence can now be remedied by any further inspection of the car."

44. In *McFarlane* Kearns J. stated:

"Common sense parameters of reasonable practicality must govern any determination of the scope of the duty of the Gardaí when seeking out or preserving evidence and remote possibilities arising from the loss of evidence should not be allowed to trip up the prosecution or justify stopping the trial from taking place." (Emphasis added)

45. I consider that in both these quotations the key test is that of reasonableness, a criterion to be applied in each of these cases.

46. In the instant case the applicants' argument, no matter how attractively presented, ultimately invites the court to embark on a

series of hypotheses commencing with the proposition that if the video cameras were operating on the night in question, and they would have captured relevant evidence, unobscured by other people, that such evidence might have exonerated the accused. Here the ultimate test, however, is whether the applicants have discharged the onus of proof which, ultimately devolves upon them. For the reasons outlined, I conclude they have not. To conclude otherwise involves equating a hypothesis with a probability.

47. Consequently, this application for judicial review must be refused.