THE HIGH COURT

[RECORD NO. 2017 465 JR]

BETWEEN

JOHN CULLEN

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Ms. Justice O'Regan delivered on the 6th day of December 2018

Issues

1. On the 19th June 2017, the applicant secured leave to maintain judicial review proceedings based upon statement of grounds bearing date the 26th May 2017. The applicant is seeking prohibition of his trial in the District Court in respect of five summary charges against him which allegedly occurred on the 15th May 2015. Four of the relevant charges arise under the Criminal Justice (Public Order) Act 1994, as amended, with the fifth charge arising under s. 4 of the Road Traffic (No. 2) Act 2011 - this offence is to the effect that the applicant should not have parked a vehicle in a public place if when so parked the vehicle would be likely to cause a danger to other persons using that place. The charges under the public order legislation are to the effect that the applicant was intoxicated to such an extent as would give rise to a reasonable apprehension that he might endanger himself or another person in the vicinity; that he did engage in offensive conduct; that he did engage in threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or being reckless as to whether a breach of the peace might have been occasioned and that the applicant failed to desist from acting in a manner contrary to s. 4 and 6 of the 1994 Act.

2. The essence of the applicant's claim for prohibition on foot of the original statement of grounds of the 26th May 2017 is that the respondent failed in its duty to seek out and preserve evidence, namely CCTV footage which was available from a source, although no longer available. The applicant states that the failure to provide this evidence results in a real risk of an unfair trial to the applicant as such evidence would identify the circumstances leading up to the alleged offences complained of by the respondent and would materially assist the applicant in the defence of such alleged offences. The applicant further suggests there then existed exceptional circumstances of a cumulative nature making it unfair to try him namely type II diabetes, having a hypoglycaemic episode on the night, an altercation with a third party and a further argument with another person following which he sustained a fractured hip.

At the hearing of the matter, the applicant sought to make two amendments to the statement of grounds.

First proposed amendment

3. This amendment was contained within a draft amended statement of grounds furnished to the respondent in July 2017. Although leave was not sought until the hearing of the matter (the second amendment was not notified to the respondent until a letter of 2nd November 2018) a statement of opposition on behalf of the respondent has been filed bearing date the 12th December 2017 wherein the first proposed amendment has been addressed. The respondent has said that addressing the first proposed amendment was without prejudice to the respondent's intention to resist the amendment application.

4. Following the securing of leave, as aforesaid, a statement was taken by the respondent of one Vincent Sweeney dated the 22nd June 2017. This statement was furnished to the applicant on the 30th June 2017. There was no prior reference to the respondent relying on Mr. Sweeney's evidence in or about the prosecution as against the applicant. The applicant complains that the statement of Mr. Sweeney is inconsistent with the applicant's account of what transpired on the night (being prior to the matters the subject matter of the summonses) and if the missing CCTV footage was available, this would have contradicted Mr. Sweeney's statement. A further complaint is made that there has been no disclosure of notes taken of this witness on the night in question. Accordingly, it is suggested that the failure to seek out or preserve the contemporaneous statement of the witness has prejudiced the applicant.

5. An amendment to a statement of ground is covered by O. 84, r. 23 of the Rules of the Superior Courts. Sub – rule 1 provides that no grounds shall be relied upon or any reliefs sought at the hearing except the grounds and relief set out in the statement. In sub – rule 2, the court is enabled at the hearing of the matter to allow either party to amend the statement specifying different or additional grounds of relief or opposition.

6. The parties agree that the matter as to an amendment of judicial review proceedings has been dealt with by the Supreme Court in *Keegan v. Garda Siochána Ombudsman Commission* [2012] IESC 29, at Paras. 30 et seq. of the judgment of Fennelly J. The court observed that there is no comprehensive and exhaustive judicial statement of the circumstances in which a court may permit the applicant for judicial review to amend the grounds for the relief sought, although the courts are reluctant to grant such an amendment without good reason. Judicial review is permissible within prescribed times subject to the court granting leave. The court noted that the object of the system was to strike a fair balance between the certainty and security of administrative decisions and the right of persons affected by them to contest them. To deviate from strict time limits provided it is necessary for the court to be persuaded that there is good reason for the delay and that no other party is adversely or unfairly prejudiced. Discovery of new facts may be an explanation for the omission to include the amendment sought in the initial statement of grounds and in some cases the applicant may have been aware at all relevant times of the facts relevant to the new grounds and this will weigh in the balance against him without being necessarily conclusive. At Para. 36, Fennelly J. noted that the cases show that the courts are reluctant to admit new grounds which amount to advancing an entirely new cause of action. Amendments may be more likely to be permitted where they do not involve a significant enlargement of the applicant's case. In that matter, the court found that the balance of justice weighed clearly in favour of granting the amendment.

7. I propose allowing the first amendment sought on the following grounds: -

> (i) Prior to the seeking of leave, the applicant was unaware of any potential involvement of Mr. Sweeney in the prosecution of the summonses as against the applicant. Therefore, it was entirely the respondent's unilateral decision to secure a statement from Mr. Sweeney, furnish same to the applicant and apparently form an intention to rely on same in the prosecution of the summonses.
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> (ii) An amended statement of grounds was prepared in July 2017 and furnished to the respondent. The statement of

opposition addressed the amended statement of grounds in this regard although as aforesaid the respondent states that this was without prejudice to its right of objection, which is accepted by the court. However, the fact that the amended statement of grounds was furnished in July 2017 and addressed in the statement of opposition and indeed by the respondent thereafter demonstrates an effective lack of prejudice to the respondent by virtue of the amendment.

(iii) The grounds of relief the subject matter of the amendment, do not involve a significant enlargement of the applicant's case.

(iv) The test as to whether or not the amended grounds are arguable is in fact a low threshold test.

In all the circumstances, I am satisfied that the balance of justice favours the granting of the application to amend based upon the statement of Mr. Sweeney of the 22nd June 2017.

Second proposed amendment

8. Ms. Siobhan Conlon, solicitor for the applicant, has in an affidavit of the 2nd November 2018 indicated that she first met the applicant in March 2016 and it had become increasingly difficult to take instructions because of his ongoing medical difficulties and since the proceedings started the applicant suffered a stroke in 2017. As a consequence, she advised the applicant to attend a senior clinical neuropsychologist for review which occurred on the 23rd October 2018 at Beaumont Hospital. At Para. x. of her affidavit aforesaid, she complains that the applicant's medical conditions taken cumulatively, mean that the applicant's right to a fair trial had been irreparably prejudiced by reason of the delay and the State's failure to seek out and preserve all relevant evidence.

9. The report of Mark Mulroney, senior clinical neuropsychologist, is exhibited, although undated. It is clear from same that he consulted with the applicant on the 23rd October 2018. In the report, significant emphasis is given to a road traffic accident which occurred in March 1997 which involved a brain injury to the applicant and there was evidence thereafter of a change in personality. The applicant made a good physical recovery but had a range of cognitive difficulties which prevented normal functioning. In the section under "Presentation", it was indicated that the taking of a history which would normally take fifteen to twenty minutes took up to one and a half hours to secure from the applicant. At Para. 4.5, the author opines that the applicant would be classified as a vascular risk with regard to ongoing vascular dementia with typical associated difficulties being concentration difficulties, attention difficulties, short term forgetfulness, difficulties with temperament, emotional lividity and perseveration, some of which may have been present prior to the most recent event, however may have been exacerbated as a result of same (presumably the recent event being the stroke of 2017). At Para. 5.5 it was indicated that it would be useful for the author to see sight of a prior report which was completed following the RTA of March 1997. In the summary and opinion section of the report, it was indicated that the applicant's overall cognitive capacities had been dulled to the extent that he would be unreliable in a court process outside of a formal advocate being present and even with the presence of such an advocate, he would make a very poor witness and he would not be able to withstand the rigours of cross – examination. His memory structures are brittle and unreliable rendering him unable to answer a question directly and possibly answer questions in a way that may actually disadvantage his own defence. It was opined that he would be a poor witness with real difficulty in understanding things that are said to him as a result of a number of issues effectively commencing with the RTA of March 1997.

10. The applicant states that this report did not become available until the 2nd November, 2018 and hence the delay in applying for an amendment based upon the report. The proposed amendment to the statement of grounds is the inclusion of a Para. J. to Ground no. 23 under the heading "exceptional circumstances". Grounds A to I within Ground 23 deal with the applicants Type II diabetes and associated symptoms, the fact that he sustained a fractured hip on the night of the incident, and that the applicant has suffered considerable health difficulties and has ongoing treatment in relation to his hip together with significant distress and anxiety as a result of the proceedings all compounded by a recent stroke (2017). The new proposed paragraph complains that the risk of an unfair trial by reason of the failure of the respondent to preserve the relevant CCTV footage has been compounded by the applicant's health and cognitive deterioration in the intervening period. It is claimed that the absence of the CCTV footage is even more acute than it might otherwise be were the applicant competent to give effective evidence in his own defence.

11. The respondent argues that this new ground comprises a significant enlargement of the applicant's case on the basis that it is a last minute application and no justification has been given as to why the report was not commissioned at an earlier time given the fact that Ms. Conlon suggests that since she first met the applicant his ability to give instructions has been deteriorating. It is argued that leave was granted on the basis of a perceived unfairness due to the absence of CCTV however the new ground is in effect a ground that he has an inability to defend himself or his ability has been compromised due to a deterioration in his cognitive functioning. The respondent refers to the several affidavits of not only the applicant but also his son in the within judicial review application to demonstrate that there is no evidence therein to the effect that there is any concern as to the applicant's cognitive functioning. In this regard, the applicant has sworn four affidavits in total and indeed the last affidavit sworn bearing date the 5th March 2018 describes an encounter between the applicant and Garda Duffy in 2015 in detail which is not at all consistent with a suggestion that the applicant has cognitive impairment or difficulty in recall. The applicant's son swore two affidavits dated the 28th May 2017 and the 19th January 2018 and in neither affidavit does he express any concern as to his father's ability to recall matters or suggest that his father's cognitive function is deteriorating.

12. The applicant does not refer to his stroke at all in his four affidavits and the applicant's son refers to his father's stroke in early March 2017 but only by way of reference to the applicant's medical history which does not involve any suggested cognitive impairment. The respondent complains that there has been no effort in the grounding affidavit of Ms. Conlon to explain why if the applicant's cognitive impairment was deteriorating since March 2016 and in particular since March 2017, that it was not until the summer of 2018 that an assessment was considered.

13. The respondent's expressed difficulty in this regard was well made.

14. Notwithstanding the matters highlighted by the respondent, I believe that it would be in accordance with the judgment of the Supreme Court in Keegan to afford the applicant liberty to amend the proceedings to include reference to the assessment following the interview of the 23rd October 2018. This would not involve any further delay in the disposal of the matter given that the parties were in a position to deal with all aspects of the matter when before the court and the applicant acknowledges that if leave is granted it can be assumed that the respondent would amend the statement of opposition to deny the impact of the assessment report as contended for by the applicant on the outcome of the within judicial review proceedings. It does appear to me to be arguable that the report may have a bearing on the outcome, that arguable grounds generally is a particularly low threshold and although the respondent suggests that the amendment will create a new cause of action nevertheless the proposed amendment has been framed in circumstances where it has been used by way of exceptional circumstances which in any event was a matter being pursued by the applicant within the original statement of grounds.

Substantive matter
15. It appears that prior to the incident the subject matter of the various charges made as against the applicant, the applicant had parked his car to purchase food, and following such purchase had an altercation of some description with a third party which was captured by CCTV cameras associated with the public house outside of which was the location of the incident giving rise to the various charges. The applicant's son had attended the public house and apparently viewed this CCTV the day after the incident however it was not until a letter of the 4th July 2016 that an intimation was afforded by the applicant's solicitor to An Garda Siochána that that public house did have CCTV of the incident prior to the matters complained of in the various summonses. It should be noted that there is available full Garda CCTV footage of the entirety of the incident the subject matter of the summonses and indeed for a period immediately before same. The applicant argues that the current lack of availability of the public houses' CCTV recording prejudices the applicant in the defence of the summonses. The applicant's son has stated in an affidavit that the prior circumstances recorded in that CCTV footage differs from the account contained in the statement of Mr. Sweeney. Garda Duffy in his affidavit evidence states that he advised the applicant on the night of the incident that Garda Duffy would proceed with issuing summonses against the applicant and states that on the following day when the son attended at the Garda station, Garda Duffy told the son of the intention to pursue the matter by way of summonses (see Garda Duffy's first affidavit of the 15th December 2017).

16. In Para. 10 of the applicant's replying affidavit of the 18th January 2018, the applicant states that he has no recollection of Garda Duffy indicating that summonses would follow. In the affidavit of the son of the 19th January 2018, the son does not deny that he was advised that his father would be summonsed. Garda Duffy states that no statement was taken from Mr. Sweeney on the night and hence there are no contemporaneous notes.

17. Garda Duffy asserts in his affidavit evidence that following the advice that the public house had CCTV evidence he attended same but the footage was no longer available.

18. Given that the son states that the CCTV footage would assist his father and apparently was aware that summonses were to issue against his father, it is somewhat difficult to understand why the son did not advise An Garda Siochána following a viewing of the relevant CCTV footage of the existence of same in the immediate aftermath of the incident or otherwise attempt to ensure that such footage was preserved into the future.

19. The applicant argues that the test as to whether or not prohibition would be afforded is as set forth in B.J. v. DPP [2003] 4 IR 525 where at p. 551, Hardiman J. stated: -

> *"The test of whether there is a real risk of an unfair trial must involve the question of whether the applicant has been deprived of the reasonable possibility of evidence, or of a line of defence, which could be of significant importance."*

It is argued that the respondent has failed or refused to seek out all potentially relevant material although it is clear that there is full CCTV footage of the entirety of the incident the subject matter of the summonses. The applicant further argues that in addition to an order of prohibition based upon a real or serious risk of an unavoidable unfairness of trial, the courts have further reserved a right to grant prohibition where exceptional circumstances are established. The applicant then refers to various cases in which an order of prohibition was granted as follows: -

> (i) *P.T. v. DPP* [2008] 1 IR 701 involving an allegation of offences committed between 37 and 42 years prior to the trial by the applicant who was 87 years old. Denham J. in the course of her judgment indicated that there was no single factor which renders a case exceptional but rather it is the cumulative effect of all the factors which bring a case within the category of an exception requiring a balancing exercise to be conducted by the court.
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> (ii) *T.C. v. DPP* [2009] IEHC 400 where Hedigan J. made an order of prohibition for various sexual offences alleged to have occurred almost 40 years prior to the hearing.
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> (iii) *K. v. DPP* [2010] IEHC 23. In that case, the applicant was illiterate with learning difficulties, his mother who was a potentially helpful witness, had died, and the offences were of a 40 – year old vintage. In addition, medical reports tendered to the court deemed the applicant was unfit to be tried on the basis that he was unable by reason of a mental disorder to understand the nature and course of criminal proceedings.
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> (iv) In *J.C. v. DPP* [2017] IEHC 213, Baker J. granted an order of prohibition on cumulative grounds giving rise to exceptional circumstances although followed Charleton J. in *K. v. DPP* aforesaid to the effect that as s. 4 of the Criminal Law (Insanity) Act 2006 provided that it was for the trial judge to determine the question of fitness to stand trial on the grounds of mental illness, and accordingly there is no possible basis for substituting an inquiry on judicial review for the statutory code. In that matter the incidents complained of were over 40 years old and it was the case that the applicant could no longer instruct his lawyers, medical evidence of his fitness to stand trial was before the court, a potentially helpful witness had died, and the accused had pleaded guilty to one count and thereafter the prosecution was delayed for a seven-year period because the complainant indicated that she did not wish to pursue the matter further.

20. The applicant argues that it is the duty of the Gardai to seek out and preserve evidence and relies upon Para. 12 – 62 of Dunne on *Judicial Review of Criminal Proceedings* (Round Hall, 2011), to the effect that whether the Gardai breached this duty will generally turn upon the degree of relevance of the missing evidence to the issues to be tried. In Dunne he suggests that the applicant must establish a failure by the Gardai to preserve the missing evidence amounting to a breach of duty and then must establish that in fact the evidence missing creates a real and serious risk of an unfair trial in all of the circumstances. The statement does appear to accord faithfully with the judgment of the Supreme Court in *Savage v. DPP* [2009] 1 IR 185, however, the respondent argues that this judgment should be seen in the light of the prior Supreme Court judgment in *Dunne v. DPP* [2002] 2 IR 305 to the effect that the Garda obligation to retain and preserve evidence is to be interpreted in a practical and realistic manner and no remote theoretical or fanciful possibility will lead to the prohibition of a trial. McGuinness J., in that judgment, indicated that the missing evidence would in reality have a bearing on the guilt or innocence of the accused person.

21. MacMenamin J. in *Wall v. DPP* [2013] 4 IR 309 stated : -

> *"Judicial review applications exist only to deal with exceptional cases; where the evidence of prejudice, that is the failure to obtain identifiably relevant evidence, is so plain as to warrant prohibition."*

Insofar as the non – availability of the CCTV evidence is concerned, the respondent suggests in order for same to come within the jurisprudence aforesaid the applicant would have to establish that a prior incident with a third party would give rise to a valid defence to subsequently act in an intoxicated manner such as might endanger the applicant or other persons or engage in offensive conduct

or engage in threatening and abusive or insulting behaviour with the intent to provoke a breach of the peace or being reckless in respect thereof or refuse to desist from acting in a manner contrary to s. 4 and 6 of the 1995 Act when called upon by a Garda to do so, or to park a vehicle in a manner as would be likely to cause danger to other persons using that place.

22. I am satisfied that there is no such allowance afforded to a party as aforesaid such that it could be said that the prior CCTV footage deprived the applicant of the presentation of a valid defence and I am further satisfied that such missing footage is in respect of material that goes beyond the substance of the essential evidence grounding the charges against the accused (see the words of Walsh on *Criminal Procedures*, 2nd Ed. Para. 15 – 172). In my view it is by no means self – evident how as a matter of reality the missing evidence could assist the case that the accused wishes to make (see the views expressed by the Supreme Court in *Ludlow v. DPP* [2008] IESC 54 at Para. 53).

23. Insofar as the test identified by the applicant as per *B.J. v. DPP* aforesaid is concerned, I am satisfied that, having regard to all of the circumstances of the within matter, that test has not been fulfilled as there is no basis to suggest that the lack of the CCTV footage has deprived the applicant of reasonable possibility of evidence or a line of defence which could be of significant importance.

24. As aforesaid the duty to seek out all potential relevant material has to be reviewed in a pragmatic manner and given that the public house CCTV footage was not brought to the attention of An Garda Siochána prior to July 2016, in circumstances where An Garda Siochána had secured their own CCTV footage of the entirety of the episode giving rise to the various summonses, the applicant has failed to establish that An Garda Siochána have been in breach of their duty to seek out and preserve evidence.

25. The applicant has further failed to establish that the missing evidence creates a real and serious risk of an unfair trial in all of the circumstances.

26. With regard to the possibility of an order of prohibition on the basis of wholly exceptional circumstances, the content of the medical assessment as herein before identified is relevant as is s. 4 of the 2006 Act and the existence of the various affidavits of both the applicant and his son in the context of the within proceedings up to March 2018 when no issue as to cognitive impairment was raised by either of them. I am satisfied that the circumstances of the within matter are wholly different from the circumstances in the various cases in which the court has granted an order of prohibition, including:

a) The applicant clearly can recall events in detail of some vintage – the affidavit of the 5th March 2018 detailing an incident with Garda Duffy in 2015.

b) The applicant will have an advocate present.

c) No suggestion has been made of the applicant being unable to instruct his solicitor.

d) There is full CCTV footage of the entirety of the events the subject matter of the summonses.

In the instant circumstances I am satisfied that it is not appropriate to grant an order of prohibition.

Conclusion

27. The applicant has not demonstrated sufficient reason to grant and order of prohibition of the various summonses herein on either of the tests herein before identified and in those circumstances the relief sought by the applicant is refused.