Neutral Citation No. 2006 IEHC 1

THE HIGH COURT
JUDICIAL REVIEW

[2004 145JR]

BETWEEN

GARRETH MOLLOY

APPLICANT

AND
THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

Judgment of Ms. Justice Dunne delivered on the 13th day of January, 2006

1. The applicant in these proceedings has been charged that on 22nd January, 2003, he did intentionally or recklessly engage in conduct in that he drove in a manner which created a substantial risk of death or serious harm to another contrary to s. 13 of the Non-Fatal Offences Against the Person Act, 1997. There are four counts on the indictment in respect of the alleged driving of the applicant at four different locations on the same date.

2. The applicant now seeks an order for judicial review by way of prohibition or injunction restraining the respondent from proceeding with the prosecution of the applicant in respect of the offences of endangerment referred to above.

3. Leave was granted by this court (O'Neill J.) on 23rd February, 2004, in accordance with the statement to ground the application dated 23rd February, 2004. The grounds relied on by the applicant can be summarised as follows:

> (i) The applicant cannot get a fair trial because having been arrested and detained under the provisions of s. 4 of the Criminal Justice Act, 1984 for the purposes of being interviewed on suspicion of driving a motor vehicle; he was released having been charged and was not interviewed or fingerprinted and nor were those others who were arrested at the same time, detained, interviewed or fingerprinted.
>
> (ii) That there has been a failure to comply with the principles of natural and constitutional justice in that there was a failure to conduct any forensic testing on either the motor vehicle in question or the applicant.
>
> (iii) In returning the motor vehicle to the garda compound it is claimed that any opportunity for examining the motor vehicle for constructive forensic analysis has been destroyed thus denying the applicant the opportunity of examining the vehicle and depriving him of a reasonable opportunity of rebutting the evidence preferred against him.
>
> (iv) That the respondent failed to give adequate notice to the applicant that the motor vehicle was being disposed of and only informed the applicant after the vehicle was no longer available thereby denying the applicant the opportunity to seek independent analysis. In those circumstances it is claimed that the respondent has failed to have regard to the obligation to seek out, preserve and disclose all relevant evidence.

Background

4. The background to this application is set out in the affidavits of Yvonne Bambury, the applicant's solicitor, and Garda Michael Kearney and Garda Sean Walsh. It appears that in the early hours of 22nd January, 2003, a motor vehicle registered No. 92 D 16573, a blue Honda Civic, was alleged to have been driven dangerously around the Spencer Dock/Seville Place area of Dublin. Gardaí intercepted the car and gave pursuit. There were four occupants in the car, one of whom is alleged to be the applicant. The driver of the car was wearing a black jumper with a design on the front. Ultimately, the Honda Civic crashed into a Fiat Punto. The occupants fled from the vehicle, Gardaí gave chase and four people, including the applicant, were arrested.

5. It is alleged that the applicant was the driver of the Honda Civic. He was arrested for an offence contrary to s. 112 of the Road Traffic Act, 1961, as amended. Some two and a half hours after his arrest, he was charged with that offence and released. The other three people who had been arrested, detained and brought to Store Street Garda Station were also released. It appears that none of those detained were fingerprinted or interviewed. No clothing was taken from the applicant for examination or preservation. Subsequent to the incident, the Honda Civic car was removed to a Garda compound. Following inquiries it transpired that the Honda Civic had not been stolen.

6. On 31st July, 2003, the original charges against the applicant were struck out and he was charged with four counts of endangerment being the subject matter of this application.

Submissions

7. Complaint is made on behalf of the applicant herein about a number of matters which it is submitted have violated the right of the applicant to a fair trial in due course of law. They are:

> 1. No fingerprints were taken from those alleged to have been in the vehicle.
>
> 2. No clothing was removed from the applicant or taken for testing or preserved.
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> 3. The applicant, and the others arrested at the same time, although detained in the garda station for a period of time, were not interviewed.
>
> 4. The Gardaí failed to seek out and preserve evidence namely the motor vehicle, thus depriving the applicant of the right to evidence that might inculpate or exculpate him.
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> 5. Complaint is also made that in returning the motor vehicle to the Garda compound the Gardaí destroyed any opportunity for examining the motor vehicle for forensic analysis as any evidence that would have been present would have been destroyed in the act of removing the motor vehicle to the Garda compound. Thus it is contended that the applicant has been deprived of a reasonable opportunity of rebutting the evidence preferred against him.
>
> 6. That the respondent failed to give notice to the applicant that the motor vehicle was being disposed of and only

informed the applicant of this after the vehicle was no longer available.

8. In essence the point made by Mr. Peter Finlay S.C. on behalf of the applicant is that the car is central to this case. The case against the applicant on the book of evidence relies on the visual identification of the applicant by members of the Gardaí. The applicant has denied on affidavit that he was the driver of the car. Therefore the case turns on one person's word as against another. In those circumstances the crucial issue to be determined in the trial is who drove the car. Mr. Finlay pointed out that it was the intention of the Gardaí to have the car forensically examined and that had the car been forensically examined there may have been no evidence available to link the applicant with the driving of the car. Thus, he argued that the possibility of there being no forensic evidence to link the applicant with the driving of the car had been denied to the applicant. Accordingly, he is prejudiced by its absence and his inability to have the vehicle available for forensic examination.

9. Mr. Finlay then dealt with the issue of delay. He pointed out that the applicant had originally been charged with an offence pursuant to s. 112 of the Road Traffic Act, 1961 as amended. Subsequently that charge was struck out and it was not until 31st July, 2003, that he was charged with the endangerment counts. He was sent forward for trial in September, 2003, and his instructing solicitor came on record in September, 2003. At that point in time correspondence ensued between the applicant's solicitors and the respondent's solicitors in relation to disclosure. As part of those inquiries the applicant's solicitor sought the results of forensic analysis if any was carried out, and if not where was the motor vehicle and was it available for inspection. Ultimately it transpired that the motor vehicle had been returned to its owner on 23rd January, 2003. It appears that this was done in error as the Gardaí had intended to have a forensic examination carried out on the vehicle for the purpose of establishing that it had been in collision with the Fiat Punto. The applicant's solicitor was notified that the car was not available on 6th February, 2004. It was following that information that these proceedings commenced. Accordingly Mr. Finlay submits that there has been no delay in the bringing of these proceedings. Mr. Finlay contends that although the onus is on the applicant to show that there was not inordinate delay in bringing the application, he points out that this was not an application made late in the day such as the application made in the case *of Scully v. D.P.P.*, [2005] 2 ILRM 203.

10. Mr. Finlay noted that the respondent argued that the only evidence upon which reliance would be placed at the trial of the applicant would be evidence of visual identification. However, Mr. Finlay contends that there were descriptions of clothing given in relation to the driver of the vehicle and that no clothing was taken from any of the four individuals arrested that night, no hair samples were given which could have been compared to possible samples in various locations in the motor vehicle had it been technically examined and that accordingly the applicant is not now in a position to rebut or challenge the allegations of visual identification apart from his own denial. Accordingly he states that his constitutional right to silence has been affected and interfered with.

11. In the course of his submissions Mr. Finlay referred to the basis upon which this application is brought. He firstly referred to the provisions of the constitution and in particular Article 38(1) which provides that "No person shall be tried on any criminal charges save in due course of law". In that context he then referred to the judgment of Henchy J. in *The State (Healy) v. Donoghue* [1976] IR 325 at p. 353 where he stated as to Article 38(1):

> "It necessarily implies, at the very least, a guarantee that a citizen shall not be deprived of his liberty as a result of a criminal trial conducted in a manner, or in circumstances calculated to shut him out from a reasonable opportunity of establishing his innocence."

12. Mr. Finlay also referred to the decision of *Dylan v. O'Brien and Davies* [1887] 20 LR 300 where it was held:

> "Evidence relevant to guilt or innocence must, so far as is necessary and practicable be kept until the conclusion of the trial. This principle also applies to the preservation of articles which may give rise to the reasonable possibility of securing relevant evidence."

13. Mr. Finlay then referred to a number of other decisions namely, *Murphy v. Director of Public Prosecutions* [1989] ILRM, 71; *Rodgers v. D.P.P.* [1992] ILRM 695; *Braddish v. D.P.P.* [2001] 3 IR 127; *Dunne v. D.P.P.* [2002] 2 ILRM 241; *Bowes v. Director of Public Prosecutions* [2003] 2 IR 25 and a linked case *McGrath v. Director of Public Prosecutions* in which a judgment was given on the same date as the previous case; *McKeown v. D.P.P.*, Unreported, April 9th 2003, Supreme Court, McCracken J. I do not propose to set out in detail at this point his references to those authorities as I will refer to them subsequently in this judgment.

14. Mr. Paul Anthony McDermott BL appeared on behalf of the respondent. He referred to the affidavit of the applicant in which he expressly stated that he was not the driver of the Honda Civic as alleged by members of the Gardaí. He referred to the supplemental affidavit of Garda Sean Walsh in which Garda Walsh stated that the account given by him in the first affidavit sworn by him was a true and accurate account of what occurred, namely that the applicant was the driver of the motor vehicle. He also dealt with other factual matters raised by the applicant with which he took issue.

15. Mr. McDermott contended that the key issue in this case is whether an accused person is entitled to prohibit a trial in circumstances where he failed to seek an inspection of the car at the time of the alleged offence and first sought it almost a year later. That delay, he argued, suggested that it was not thought that an inspection would be central to the applicant's defence. He pointed out that it is the applicant who bears the burden of proof in relation to convincing the court that as a result of the matters complained of in this application that there is a real risk that the applicant will have an unfair trial. He referred to the affidavit of the applicant's solicitors Ms. Bambury at para. 11 where she pointed out that:

> "The applicant was denied at the outset an opportunity to test this motor vehicle in respect of any forensic analysis as all fingerprints would have been destroyed when the vehicle was originally driven and returned to the Garda compound".

16. He accepted that no samples were taken from the applicant or any of those arrested in respect of the same incident on the night. He pointed out that the purpose of this application was not to conduct a review of the adequacy or otherwise of the Garda investigation. He posed the question as to what use would forensic testing or examination have been. Mr. McDermott stated that initially the applicant sought to have results and details of a forensic examination of the car and subsequently sought by letter dated 18th December, 2003, to ascertain whether the vehicle was still available for inspection. Prior to the request for inspection the applicant had never alleged that he was not the driver of the car. In this context he referred to the statement of Garda Walsh contained at p. 7 of the book of evidence wherein it is stated by Garda Walsh that he demanded production of the applicant's licence for driving the car and his insurance. Further the applicant was warned when arrested that he could be prosecuted for dangerous driving and other road traffic offences. This is also referred to in the statement of Garda Walsh at p. 7 of the book of evidence. Thus Mr. McDermott contended that there is an air of unreality to this application for judicial review given that at the time of his arrest the applicant was made aware that it was the view of the Gardaí that he was the driver of the vehicle.

17. In this context Mr. McDermott argues that the delay in seeking inspection is all the more significant. He acknowledges however that the State was slow in furnishing a response to the applicant's solicitor. In his view the significance of the delay demonstrates that the purpose in seeking inspection is not to cast light on the guilt or innocence of the applicant but rather that it shows that its purpose is to stop the trial. In this context it is interesting to note that after the applicant was requested to produce his driving licence and certificate of insurance he indicated that he would produce the documentation. Following the warning in relation to dangerous driving etc. he was asked if he understood the oral warning and made no reply.

18. In this case the car was originally retained by the Gardaí for the purpose of carrying out a forensic test to establish that it had collided with the Fiat Punto. That is the sole purpose for which it was retained. It was not retained for the purpose of any other form of forensic testing. Such an examination would have been necessary to establish a charge of leaving the scene of an accident. The applicant has not been charged with such an offence and according to Mr. McDermott could not be so charged in the absence of evidence showing that the other car had been struck. It is the clear contention of Mr. McDermott that the State made a decision not to carry out any forensic testing other than that described in relation to the driving of the vehicle by the applicant. The view taken by the Gardaí and disputed by the applicant is that the applicant was caught red-handed driving the car. Not only was he caught red-handed as contended by the Gardaí but having been asked to produce his licence and insurance and having been given an oral warning in relation to dangerous driving etc. he made no assertion at that time to the effect that he was not the driver. Accordingly, this is a case in which no forensic investigation was necessary to prove that fact. Mr. McDermott posed the question whether the obligation on the Gardaí is to carry out a forensic test every time someone is charged with a motoring offence to establish that, in fact, the individual concerned was the driver of the vehicle. He contended that the duty to seek out and preserve evidence can only be interpreted in a way that does not place an unreasonable burden on the Gardaí.

19. Mr. McDermott addressed the issue of prejudice. He pointed out that there is no suggestion made by the applicant or his solicitor as to what an examination of the car in December, 2003, when such examination was first sought, could show that might exculpate him. He reiterated that Ms. Bambury in her affidavit had referred to the fact that once the vehicle had been driven from the place in which it came to a halt to the garda compound its value in respect of fingerprints was gone.

20. Mr. McDermott then dealt with the chronology of events in this case and drew attention to the various steps amounting in his view to delay. He referred to a number of authorities which have considered the element of delay and that such delay is a basis for refusing relief in missing evidence cases. I will deal further with the authorities in that regard.

21. He argued that in a case where a Garda saw a person in a vehicle and kept him in vision between that time and the time of his arrest, in those circumstances, the individual not having indicated that he was not the driver of the vehicle, there was no duty to preserve the vehicle and obtain fingerprint evidence therefrom. Mr. McDermott argued that the fact that it is now denied on affidavit by the applicant that he was the driver is not of significance in looking at the decision of the Gardaí to return the car to its owner. Mr. McDermott referred to the decision in *Z v. D.P.P.* [1994] 2 IR 476 in which Finlay C.J. stated:

> "An onus to establish a real risk of an unfair trial… 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 must be an unavoidable unfairness of trial."

22. He referred also to the decision in the case of O'Callaghan v. The Judges of the Dublin Metropolitan District Court, Unreported, High Court, 20th May, 2004 (Kearns J.) in which an application for prohibition was brought because the Gardai had not sought out CCTV footage which might have shown the incident where the applicant had been caught red-handed. He posed again the question as to whether the request made for the inspection of the motor vehicle in question was a genuine request or one that only emerged after it was discovered that the car was no longer available.

23. By way of reply Mr. Finlay referred to the right to silence and that the respondent could not draw inferences from the right exercised by the applicant at the time of his arrest not to say anything at that time or indeed at a later stage. He pointed out that the fact that someone complied with a request to produce a driving licence and insurance is not an admission that they are the driver of the particular vehicle at the time in question. Mr. Finlay repeated his contention that the criticism in this case relates to the failure to preserve elementary evidence and indeed he stated that there was simply no system of preservation of elementary evidence. He contested the idea that it was sufficient to say that the applicant was caught red-handed, and indeed disputed that allegation. His main point was that if it was possible to have discovered exculpatory evidence by an inspection of the motor vehicle he has been deprived of that opportunity and accordingly cannot obtain a fair trial.

The Law

24. Counsel cited a number of cases in relation to the relevant law in this area. The line of authority that has developed in what are now known as "missing evidence" cases could be said to have commenced with the decision in the case of *Murphy v. D.P.P.* [1989] ILRM, a decision of Lynch J. in a case where the applicant sought leave to examine a vehicle which was still in Garda custody and had been refused such access, Lynch J. commented:

> "It may well be that nothing would have been discovered by the requested forensic inspection, but the applicant has been deprived of the reasonable possibility 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".

25. In the case of *Rodgers v. D.P.P.* [1992] ILRM 695, the applicant sought inspection of a motor vehicle two and a half months after the prosecution had carried out forensic testing on the motor vehicle with negative results. O'Hanlon J. stated:

> "I would hold that any forensic examination, whether by the Gardaí or on behalf of the accused person, should be sought and should take place within a reasonable time, having regard to all the circumstances of the case so that the property can then be returned as expeditiously as possible to its true owner."

26. One of the key issues before me in the present case is the length of time that elapsed before a request for inspection was made. From November of 2003, the applicant's solicitors were seeking to ascertain whether any forensic testing had been carried out and if so the results of such testing. It was not until 18th December, 2003, that a request was made for inspection. The offence alleged occurred some eleven months earlier approximately on 22nd January, 2003. Clearly, this raises a significant question as to whether it would be appropriate at such a late stage to grant an injunction or an order of prohibition in respect of the trial. Undoubtedly there was some delay in the response of the State to this query but to my mind prosecutorial delay in responding to such a request does not take away from the obligation on an accused person to seek a forensic examination within a reasonable time. However, it should be noted that in this particular case although the Gardaí themselves had had the car removed to a Garda compound for the purpose

of carrying out a forensic test as indicated above, the car was in fact, returned inadvertently without such testing having been carried out to the owner within two days of the incident alleged. No notification of that return or proposal to return was advised to the applicant or anyone on his behalf. I will revert to the issue of delay at a later stage in this judgment.

27. The issue of lost evidence arose in the case of *Braddish v. Director of Public Prosecutions* [2001] 3 IR 127. This was a case which concerned a video surveillance tape. The tape had been viewed by the investigating guard who believed that he could identify the person who had carried out a robbery which was captured on the video surveillance tape. Some nine months later he was arrested and detained. The videotape in question was requested by the accused's solicitor and it appeared that the same had been returned to the injured party and was no longer available. The applicant brought judicial review proceedings on that basis and the respondent's countered that there was to be no reliance placed upon the contents of that tape but on the basis of an alleged confession. In the course of the judgment of the Supreme Court in that case Hardiman J. stated at p. 133:

> "It is the duty of the Gardaí, arising from their unique investigative role, to seek out and preserve all evidence having a bearing or potential bearing on the issue of guilt or innocence. This is so whether the prosecution proposes to rely on the evidence or not, and regardless of whether it assists the case the prosecution is advancing or not."

28. He went on to say at p. 135:

> "The foregoing remarks arise in the specific context of this case and arguments raised in it. It would be difficult to think of evidence more directly relevant than a purported videotape showing the commission of the crime. But in cases where the evidence is not of such a direct and manifest relevance, the duty to preserve and disclose has to be interpreted in a fair and reasonable manner."

29. A similar situation arose in the case of *Dunne v. D.P.P.* [2002] 2 ILRM 241 which again sought a videotape although in that particular case there was doubt as to whether the Gardaí had ever taken possession of the videotape. In that case Hardiman J. gave the majority judgment and stated at p. 259:

> "The emphasis, which is quite explicit both in Braddish and in this judgment, on the need for the obligation to seek out, and indeed to reserve, evidence to be reasonably interpreted requires, I hope, that no remote, theoretical or fanciful possibility will lead to the prohibition of a trial. But we are not dealing with anything of that sort here. On the evidence in the present case it is overwhelmingly likely that a video camera recorded the actual conduct of this robbery its unmasked perpetrators. In those circumstances it appears to be not a possibility or even a mere probability, but a near certainty, that the videotape would indeed constitute evidence bearing vitally on the question of guilt or innocence."

30. Mr. Justice Fennelly furnished a dissenting judgment in that particular case.

31. Reference was also made to the judgment of the Supreme Court in the case of *Bowes v. D.P.P.* and *McGrath v. D.P.P.*,2003 2 I.R. 25. Judgment in those cases was given jointly. In the Bowes case the allegation related to possession of drugs with intention to supply. The applicant sought leave to inspect a motor vehicle which had been involved in the alleged offence and access to same was sought shortly before the trial. The application for judicial review in that case was refused. In dealing with the question of delay in the context of the first applicant's appeal, Hardiman J. stated at p. 39:

> "If indeed, the applicant in the first appeal's defence is going to be that some third party placed the drugs in the boot of the relevant car, presumably without his knowledge, that is a matter which only he could know and he would presumably have mentioned this to his legal advisors. If, in turn, those advisors felt that an independent examination for fingerprints was required they would presumably have requested it. I mention these factors not on the basis that the applicant may be disqualified on the grounds of delay but on the more basic topic of whether there existed a real loss of an opportunity to rebut the prosecution's case. I do not believe that any such loss occurred. The fact is that the case against the applicant in the first appeal is based on the finding of the drugs in the car of which he was the driver and an alleged oral statement immediately after the finding, which, if admitted and accepted by the jury, might be thought to demonstrate knowledge of the contents of the boot. I cannot see what any forensic examination could do to rebut this evidence and therefore conclude that the application in the first applicant's appeal falls at this first hurdle and need not be discussed further."

32. In the second appeal dealt with in that judgment it was concluded that the applicant had suffered the loss of a reasonable prospect of obtaining evidence to rebut the case made against her in circumstances where the Gardaí had parted with a motor cycle which had been involved in a collision where the applicant was subsequently charged with dangerous driving causing death. The motor cycle had it been examined might have revealed a defect which could explain the accident which occurred leading to a view that it was not caused by the dangerous driving of the applicant.

33. Another case referred to was that of *McKeown v. D.P.P.* Supreme Court, Unreported, 9th April, 2003. Leave was refused by the High Court in that case and such refusal was upheld by the Supreme Court. McCracken J. at p. 9 of his judgment stated:

> "It was strongly emphasised in the judgment in that case (McGrath), that the issue was not whether the Gardaí were in some way at fault in either not finding or not retaining possible evidential material, but rather whether the Gardaí's failure, whether it be negligent or innocent, in some way prejudiced the applicant in conducting his defence."

34. He went on to say at p. 10:

> "While the Gardaí may have been satisfied in their own minds that their belief that they saw the applicant getting out of the stolen motorcar in the early hours of the morning, attempting to leave the scene and ultimately assaulting the Gardai was sufficient to obtain a conviction, I would strongly emphasise that that is not the test. The question is not whether the Gardaí might want to use any available evidence, or might wish to assist the Director of Public Prosecutions by producing it, but rather whether this evidence even if it not to be used by the prosecution, could be of assistance to the defence."

35. He continued at p. 11:

> "As was emphasised in the *Bowes* and *McGrath* cases, the test is not a question of blame. The test is whether the applicant has been deprived of a real opportunity to rebut the case against him."

36. I should further note the comment made by McCracken J. in that case at p. 9 of his judgment where he stated:

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

37. In addition to those cases, Mr. McDermott on behalf of the respondent referred to the decision of Finlay Geoghegan J. in the case of *Connolly v. D.P.P.* [2003] 4 IR 121 in which it had been held that, where the Gardaí arrested and charged a person, whom they considered they had seen in a stolen car; such person gave no indication that he was not the person in the car and the owner of the car was seeking its immediate return as she had no other transport, it was not necessary and practicable to preserve the car for a further two months to obtain fingerprint evidence. Considerable emphasis was placed on this judgment by Mr. McDermott and I think it would be helpful to quote briefly from the decision in that case. At p. 130 of her judgment, having reviewed a number of decisions in missing evidence cases including the case of *Murphy*, *Braddish* and *Dunne* she stated:

> "As appears from the foregoing, the duty on the Gardaí to seek out evidence must be interpreted realistically on the facts of each case."

38. Having recited the facts, she then went on to say:

> "If the facts of the case were that the Gardaí had arrested the applicant whilst actually in the car then I do not think it could be suggested that the Gardaí were under any duty to seek fingerprint evidence from the car before returning it to an owner. At the other end of the scale, if Gardaí, having received a report of the stolen car, found the car, did not see any person actually in the car and arrested and charged a youth who happened to be nearby and he immediately stated he was not in the car then they probably would be under a duty to seek fingerprint evidence. The facts of this case fall between these two extremes. I have concluded that applying the duty to seek out evidence in accordance with the principles determined by the Supreme Court with the facts of this case that the Gardaí were not under a duty to preserve the vehicle and seek fingerprint evidence before returning it to its owner. I have reached this conclusion principally as the unchallenged evidence of Garda Nash is that he saw the applicant in the car and kept him in vision between that point in time and the point in time when he arrested him. Further, that having been arrested and cautioned the applicant made no reply and throughout the period in custody did not request a solicitor. In circumstances such as this, where Gardaí arrest and charge a person, whom they consider they have seen in a stolen car; such person gives no indication that he was not the person in the car and the owner of the car is seeking its immediate return as she has no other transport, it does not appear to me that it is "necessary and practicable" to preserve the car for a further fifty hours and obtain fingerprint evidence."

39. Reference was also made to the decision in *Scully v. D.P.P.*, Unreported, Supreme Court, 16th March, 2005. That was a case in which the applicant was charged with an offence alleged to have occurred in the fore court of a filling station. Some months later he made inquiry about the position in relation to videotape evidence. Hardiman J. in his judgment commented at p. 211:

> "The fact is that the rationale of this application vanished after the undisputed facts in relation to the video surveillance on the filling station at the time of the crime were revealed. This did not happen until quite close to the trial because the applicant did not investigate the position any earlier. This, in turn, appears to me to indicate that the applicant was more interested in tripping up the investigators than in discovery of evidence: certainly he was constrained to continue his application on the basis of a theoretical possibility only."

40. In that case it transpired that video footage was not available because the application was made on a misapprehension that the video surveillance equipment in place at the time of the application was that which had been in place at the time of the alleged commission of the offence. In fact as was accepted by the parties, it transpired that the video surveillance did not in fact cover the area where the offence was alleged to have occurred.

41. In considering the question of delay in that case Hardiman J. went on to comment on the question of when time should be considered to run against an applicant and stated:

> "Obviously there might be cases where it would be proper to reckon delay from the date of the offence. If the defendant was immediately charged and it was common case that the defendant was present at the time of the alleged crime but the issue was whether he had participated in it, whether there was a question of self defence, whether there was a question of self defence, or something of that kind, that might be so."

42. A further judgment was referred to which touches on the question of delay also. In the case of *Cole v. A Judge of the Northern Circuit*, Unreported, High Court, 17th June, 2005, Macken J. made the comment:

> "I am not satisfied that on the jurisprudence, it is always the case that a defendant is entitled to await the actual charges, as is contended for."

43. Finally reference was made to a decision in a case of *Manning v. D.P.P.*, Unreported, High Court, 29th July, 2004, in which an application was rejected by O'Leary J. as a result of a thirteen month delay in seeking leave. It was stated:

> "Even in the context of the merits the issue of delay is relevant. Why did the applicant not seek the assistance of the court up to the period immediately before his trial? Had he had complaints of delay up to that point?

44. This is not a theoretical question as it has real significance in legal terms. As set out in detail in the leading United States case of *Barker v. Wingo* [1972] 407 US 514 it is likely that an applicant who alleges prejudice by reason of delay will complain of that prejudice at an early date and failure to do so can be a compelling indication of the absence of real prejudice."

45. On this point it was submitted by Mr. McDermott that the same principle applies to a delay in seeking evidence. In this case he submitted that it was made clear to the applicant when arrested that he was the driver of the car. Despite this he did not deny being the driver or seek any examination of the car at that time.

Conclusions

46. Having considered the submissions and the authorities cited to me it seems to me that certain matters are clear. In considering an

application such as the present one before me the underlying principle upon which all such applications are predicated is the test referred to by Hardiman J. in *Dunne v. Director of Public Prosecutions* at p. 319 where he stated as follows:

> "I believe there is only one test to be applied on such an application. It is that deriving from the judgment of Denham J. in *B v. Director of Public Prosecutions* [1997] 3 IR 140 at 196; 'The communities right to have offences prosecuted is not absolute but it to be exercised constitutionally, with due process. If there is a real risk that the applicant would not receive a fair trial then, on the balance of these constitutional rights the applicant's right would prevail…' (emphasis added)."

47. It is also clear from the authorities I have referred to above at length that it is the duty of the Gardaí to seek out and preserve evidence having a bearing or potential bearing on the issue of guilt or innocence. That duty is not to seek out every potential piece of evidence however peripheral indirect or tangential. As was stated in his judgment in the *Braddish* case Hardiman J. pointed out that in cases where the evidence is not of such a direct and manifest relevance, the duty to preserve and disclose has to be interpreted in a fair and reasonable manner. In the context of considering the missing evidence in this case, the argument is that the applicant has been deprived of the opportunity to inspect and carry out forensic tests on the motor vehicle. The purpose of doing so would be to rebut the visual identification evidence of the Gardaí and to add force to the applicant's denial that he was the driver of the car. How such forensic testing in this case would assist the defendant is not entirely clear. At best, it seems to me that testing the vehicle for fingerprints, hair samples or fibres from clothing could establish the presence of the applicant at some time in some part of the vehicle. It should be noted that the applicant in his affidavit sworn herein stated:

> "I say that I was not the driver of the Honda Civic as alleged by the members of the Gardaí."

48. At a further point in the affidavit he states that his legal advisors were never informed of the name of the owner of the vehicle. At its worst, the possibility is that forensic testing would have produced negative results. So far as the case made against the applicant on the book of evidence is concerned and having regard to the affidavit sworn by the members of the Gardaí herein it is clear that the allegation being made against him is that he was caught red-handed. Garda Sean Walsh in his affidavit stated that the vehicle was being driven by the applicant, that he got a clear view of the driver at numerous times during the pursuit and that the applicant was identified to him by Garda Kearney who was previously familiar with the applicant. He pointed out that a number of attempts were made by the Honda Civic to ram the garda vehicle. He also added that the Honda Civic was in their view at all times during their pursuit. When it crashed he got another good look at the driver and he stated that he chased the applicant who got out of the driver's door and apprehended him a few hundred metres away from the scene of the crash. He pointed out that the applicant was in his sight at all times.

49. In considering the circumstances of this case and having regard to the nature of the evidence which is likely to be led against the applicant namely the eyewitness account of Garda Walsh and Kearney, it seems to me to be hard to reach the conclusion that the missing evidence in this case that might have been available upon forensic examination is not such as to come within the category of direct and manifest relevance. As I have indicated above the most it can do is to establish that the applicant was in the motor car at some time. That does not appear to be disputed by the applicant. He simply disputes that he was the driver of the car. The issue seems to me to be whether the prosecution will be able to establish that at the time the alleged offence was committed the applicant was the driver of the vehicle. This will hinge on the view taken by a jury as to the credibility of the Gardaí on the one hand and the applicant, should he choose to give evidence on the other hand. Even if the evidence sought by the applicant was available I cannot see how it could help to determine the issue that has to be decided. It does not seem possible to me that any such forensic evidence could rebut visual identification evidence.

50. One of the issues in this particular case that has caused me concern is the question of delay in making the application. Initially in this case the applicant was charged with an offence contrary to s. 112. Those charges were ultimately dropped and the applicant was charged with the current offences on 31st July, 2003. It seems to me that as a matter of practicality the importance or otherwise of the motor vehicle from the point of view of forensic testing arises just as much in the context of a s. 112 charge as it would in the context of an endangerment charge. No steps were taken by the applicant or on his behalf to seek an inspection of the vehicle while those charges were pending. It was not until the letter of 12th December from the Chief Prosecution Solicitor was received by the applicant's solicitor that the question of inspection was raised. In fairness the letter of 12th December merely informed the applicant's solicitor as follows:

> "The vehicle involved in the alleged incident was seized under s. 41 of the Road Traffic Act, 1961 to 1994. No forensic tests were completed on the blue Honda Civic."

51. This letter did not answer the original query from the applicant's solicitor as to what happened to the Honda Civic and whether it was returned to its owner or retained by the Gardaí. Nonetheless it is fair to say that the request for an inspection did not occur until after the applicant was informed through his solicitors that the vehicle was not available for inspection. The overall delay in seeking an inspection in this case is such as to bring to mind the words of Hardiman J. in *Scully* where he commented on the applicant's desire in that case being more to trip up the prosecution than to discover evidence. (See p. 211.) There may be some cases in which it is not possible to make a request for inspection until such time as an accused has been served with a book of evidence and thus becomes aware of the full extent of the case being made against him or her. However, this is not such a case. In respect of both the s. 112 charge and the endangerment charges, it has from the very first moment of his arrest been clear to the applicant that it would be alleged he was the driver of the vehicle. Obviously, he could not have sought inspection in respect of the endangerment charges until he was charged with those offences in July 2003, there is no reason why he could not have sought such inspection immediately thereafter. He did not do so. In the circumstances, I am of the view that he is debarred from seeking prohibition by reason of his delay.

52. If I am wrong in my view on delay, I should add that a matter that causes me concern in this case and in cases involving the driving of a motor vehicle is the extent to which an applicant for judicial review can rely on missing evidence to ground an application for prohibition in circumstances where the applicant did not at any stage indicate to the Gardaí that he was not the driver of the vehicle. In this particular case, at a number of points it was open to the applicant to have made clear that he was not in fact the driver thus alerting the Gardaí to the possible need to retain the motor vehicle at least for such time as may have been necessary to carry out any forensic examination. The facts of this case are very similar to the facts in the case of *Connolly v. D.P.P.* referred to above. In that case Finlay Geoghegan J. concluded having regard to the facts in that case that the Gardaí were not under a duty to preserve the vehicle and seek fingerprint evidence before returning it to its owner. She reached that conclusion in that case in circumstances where the evidence of the relevant Garda was unchallenged to the effect that he saw the applicant in the car and kept him in vision between that point in time and the point in time when the arrest occurred. That case is slightly different from the facts of the present case in that the applicant in that case did not swear any affidavit. Here the applicant himself has sworn such an affidavit saying that he was not the driver of the car. In the Connolly case, the applicant instructed his solicitor that he was not in

fact in the car. The facts of the present case before me are further somewhat different in that the applicant has simply denied that he was the driver of the vehicle at the relevant time. It is unfortunate that the Gardaí in this case having determined that there should be forensic examination of the car for the reason outlined (which would not have been for the purpose of establishing the presence or otherwise of the applicant as the driver of the vehicle), that the vehicle was then returned to its owner without any form of notification to the applicant. It is clear from the affidavit of Yvonne Bambury that fingerprint analysis of the vehicle would have been of little use anyway given the manner in which the vehicle was removed to the garda compound. Further forensic testing might have established positively that the applicant had been in the car but that cannot prove or disprove the crucial issue in this case, namely was the applicant the driver of the car or not at the relevant time. To prove that will require eyewitness testimony and visual identification of the applicant by the Gardaí and is ultimately a matter that can only be determined by a jury.

53. The duty to preserve and seek out evidence is not an unlimited one and must be interpreted realistically having regard to the facts of any individual case. In my view the applicant in this case did not seek inspection of the vehicle for a significant period after which it must have been clear to him and to his legal advisors having regard to the instructions he had given that inspection should be sought. It cannot be "necessary and practicable" to retain a motor vehicle for upwards of a year in the absence of any suggestion from the applicant that he was not the driver of the vehicle on the basis that it might be necessary for the purpose of facilitating an inspection at some stage. To conclude otherwise would place the Gardai under an impossible burden, not to mention the hardship caused to the owners of such vehicles in such circumstances.

54. I have reached the conclusion that apart from the issue of delay, the applicant herein has not established that forensic evidence would have been available to him on an inspection which would have helped determine the issue as to whether he was the driver or not and thus has not discharged the onus of proof that he will receive an unfair trial as a result of the lack of what would, by any description, be speculative evidence and in my view, evidence which would not have a bearing on his guilt or innocence. So far as fingerprint evidence is concerned, it was accepted by Miss Bambury that it was not likely to be available. Further, the applicant herein did not make clear at any stage prior to these proceedings that it was his defence that he was not the driver of the car in circumstances where he previously had opportunities to make this point, namely, when arrested, cautioned, charged, and in those circumstances it was not necessary or practicable to preserve the car.

55. In conclusion, the application is refused.