

THE HIGH COURT

Record Number: 2004 No.1182 JR

BETWEEN

GARRETT O'BRIEN

APPLICANT

AND
DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 22nd day of July 2005

1. The applicant faces prosecution on a charge of dangerous driving causing serious bodily harm to another person allegedly on the 24th August 2003 at Bray, Co.Wicklow.He is also charged with four other offences arising out of the same alleged incident.These charges are pending before Wicklow Circuit Criminal Court.

2. The Book of Evidence has been served, and it is apparent from this Book of Evidence that one of the witnesses, Paddy Moorehouse, who has made a statement to the Gardai and who states that he saw the applicant driving the particular car on the occasion in question is a member of a family which, as is averred to by the applicant's solicitor, and which is accepted by the Gardai, is in a long-standing feud with the applicant's family.Part of that statement is to the effect that he recognised the applicant as being the driver of the car, and he goes on:

"A woman came over to me with a piece of paper and a number written on it 00 D 81303, then the ambulance came and two patrol cars came."

3. There are two other statements from persons who say they saw this incident and who also say that they saw the applicant driving the car in question on that occasion.

4. However, the fact of the matter now is that the solicitor acting for the applicant has been informed by the member of the Garda Síochána to whom this piece of paper was handed by Paddy Moorehouse, that it has been lost, and cannot therefore be handed over to him so that the handwriting can be examined by an expert for the purpose of establishing whether or not it is in fact the writing of Paddy Moorehouse.In other words, the applicant is deeply suspicious, especially because of the ongoing feuding relationship between his family and the Moorehouse family, that he is being "fitted up" with this offence, and that the statement by Paddy Moorehouse that he was handed the piece of paper by this lady with the applicant's registration number written thereon, is a concoction for the purpose of bolstering his own credibility as a witness who says he saw the applicant driving the car on the occasion of this incident.The Court has been informed that the applicant has available to him a signature written by Paddy Moorehouse against which the writing on the piece of paper could have been compared in order to establish its authenticity.The suspicion is that Mr Moorehouse himself may have written the number on the piece of paper himself.The applicant believes that the said Paddy Moorehouse is ill-disposed towards him, and that he is now hampered in attacking the credibility of an important witness at his trial by not being able to test the authenticity of the piece of paper.He maintains that if he were able to undermine the credibility of Paddy Moorehouse as a witness by being able to establish by testing the writing in the note that Paddy Moorehouse was lying about the woman handing him this piece of paper, he be greatly assisted in his defence of the charge, since the identification issue is critical to the case.Paddy Moorehouse of course is not the only person who has made a statement in which the applicant is identified as the driver of the car, but because of the feuding between the families of the applicant and Mr Moorehouse, the applicant submits that demolishing the credibility of Mr Moorehouse will feed into his attack on the credibility of these other two supposed eye witnesses, since the applicant fears that there is a connection between these witnesses and Mr Moorehouse – in other words that there is a concerted effort by all of these so-called witnesses of the incident to fit up the applicant for the charge.I will come back to that question later.

5. It is submitted by the applicant that without the availability of this piece of paper and therefore the opportunity to have its writing tested against that of Mr Moorehouse, the applicant is left in what is described as the unenviable position of having to give evidence at his trial and deny in the witness box that he was the driver of the car in question, as alleged by Mr Moorehouse and those who the applicant sees as his associates.Whereas if the testing proved that the note had been written by Mr Moorehouse, and not by the mysterious lady, this would assist him or corroborate in his denial without putting him to the hazard of himself giving oral evidence, which he would not otherwise be under any obligation to do.

6. I should add that the member of An Garda Síochána to whom the piece of paper was handed has sworn an affidavit in which she confirms that the piece of paper is no longer available.Neither has she been able to trace the woman who is supposed to have written down the registration number of the applicant's car.That woman did not apparently remain at the scene, and indeed this is something to which the applicant refers and indeed relies upon in his scepticism about the authenticity of the writing on the piece of paper.He submits that it is unlikely that somebody so civic spirited and responsible so as to note and hand over to Mr Moorehouse the registration number of the car, would not also at least also give her name and address and contact details, or even better, wait the short time for the arrival of the Gardai to the scene and give those details to them.

7. The issue to be decided is whether the admitted loss of the piece of paper in the circumstances of this case is something which has now disadvantaged the applicant in his defence against these charges as to give rise to a real risk that his trial will be unfair.It is important to highlight that the importance of the piece of paper is not that it contained the registration number itself, since that would in any event be hearsay as against the applicant at the trial.Rather, its importance lies only in its ability, if found to be a concoction, to assist the applicant to discredit the testimony of Paddy Moorehouse and maybe the other eye-witnesses to the extent that they may be shown to be associates of Mr Moorehouse, and assisting in what the applicant sees as the framing of him for these offences.

8. Feichín McDonagh SC on behalf of the applicant has submitted that the prosecution are obliged to keep any piece of physical evidence which might lead to a reasonable possibility of securing evidence which can rebut prosecution evidence against the applicant.He points to the fact that the note in question was one of the factors which led to the prosecution of the applicant.

9. As far as the law in this area is concerned there is not much controversy between the parties.The items of evidence covered by the obligation on the part of the prosecution authorities to preserve and disclose same to the Defence are not confined to those items upon which they themselves intend to rely to support the prosecution case.As Hardiman J.has stated in this regard in *Braddish v.DPP* [2001] 3 IR 127 at p.133:

"The prosecution are not entitled to take the view that once they have better evidence, or evidence more convenient to them to deploy, they are entitled to destroy the evidence which came first to hand....."

It is important to bear in mind that the evidential items to which the foregoing applies are not only those with a direct and established evidential significance, but include those which in the words of Lynch J.in Murphy v. Director of Public Prosecutions [1989] I.L.R.M.71 at p.76 "may give rise to the reasonable possibility of securing relevant evidence".

10. In the same judgment, the learned judge went on to refer to the this question in the context of a civil proceeding and referred in that regard to Sterling-Winthrop Group Ltd v. Farben-Fabriken Bayer A.G.[1967] IR 97 in which it was in the high Court that documents to be produced were not only those which would be evidence either to prove or disprove any matter in question in the action but included "every document.....which.....may - not must- either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary."

11. Clearly, the piece of paper at issue in the present case must be seen as falling into the category of evidence which may, if the applicant's suspicions are substantiated upon examination of the handwriting, have the capacity to damage or undermine the credibility of a principal prosecution eye witness, and therefore the strength of the prosecution case against the applicant.

12. The learned judge stated also at page 131 of his judgment:

"It is well established that evidence relevant to guilt or innocence must, so far as 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. Again, the piece of paper falls clearly into this category.I am also satisfied that the potential unfairness caused by the absence of this piece of evidence is not something which can be eliminated by anything which the judge at trial may be able to say to the jury.The question remains as to whether the potential prejudice to the applicant can be eliminated by the prosecution deciding not to call Paddy Moorehouse at all to give evidence.In that way his evidence of visual identification would not be given, and therefore his credibility as a prosecution witness would not become an issue.In any event what is written on the piece of paper is inadmissible against the applicant on the grounds that it is mere hearsay evidence.There are also two other witnesses, who according to their statements of evidence in the Book of Evidence served, who will say that they saw the applicant driving the car on the occasion in question.

14. But Mr McDonagh's answer to that is that the applicant wants Paddy Moorehouse to give his evidence and wants to be in a position to question him about this mysterious lady who has disappeared into thin air, and to then seek to establish to the jury's satisfaction that it was in fact Paddy Moorehouse who for nefarious purposes connected with the ongoing feud between the two families has fabricated this piece of evidence to bolster an otherwise unimpressive case against the applicant.He would wish to show also that this feature of the case, once established, also cross-contaminates the evidence of the two other eye witnesses who say that they saw the applicant driving the car, as he believes that these two witnesses are also associates of Paddy Moorehouse who are assisting him in his attempt to frame the applicant for the crime.

15. This Court is not concerned with whether this theory is or is not correct.That is a matter for the jury if this case were to go to trial.But what this Court must be concerned with is whether the applicant, who is entitled to put forward a Defence, is disadvantaged to the point of unfairness by the absence of the piece of paper.I believe, taking the Defence case at its highest that he must be, since without the opportunity of establishing that the writing is indeed that of Mr Moorehouse, the applicant has no way, other than denial in the witness box, uncorroborated by any objective testimony, that he was driving on the occasion.If the conspiracy theory was substantiated I believe that its effect would not be confined to Mr Moorehouse's evidence but has the capacity also to affect the credibility of the other two eye witnesses.

16. While I accept of course that a reasonable balance must be struck between the obligation of the prosecution to prosecute and the right of the accused to defend him self or herself by all legal means, one must bear also in mind the presumption of innocence which the applicant enjoys, and the onus of proof which is at all times upon the prosecution to prove its case beyond a reasonable doubt.I am conscious of what was stated by Hardiman J.in Dunne v.DPP [2002] 2 IR 305 at page 323 when he stated:

"...The emphasis, which is quite explicit both in Braddish v, Director of Public Prosecutions [2001] 3 IR 127 and in this judgment, on the need for the obligation to seek out, and indeed preserve, 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."

17. The same is I believe true in the present case, the more so because of the ongoing feuding, not disputed in any meaningful way by the Gardai, between these two families.I believe that if the applicant had the opportunity to have the piece of paper examined he would have the possibility, and that is all that should be required, to create in the mind of the jury a reasonable doubt, in the event that his fear of fabrication in relation to this piece of paper is substantiated on examination.He is therefore, on the balance of probabilities, handicapped in his Defence to the point of potential unfairness.

18. I therefore grant the relief sought.