Neutral Citation Number: [2010] IEHC 22

THE HIGH COURT

JUDICIAL REVIEW

2009 680 JR

BETWEEN

ANTHONY LEAHY

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

AND

HIS HONOUR JUDGE MICHAEL O'SHEA

RESPONDENTS

JUDGMENT of Mr. Justice Charleton delivered on the 5th day of February, 2010

1. The applicant seeks to prohibit the respondents from trying him on a charge of dangerous driving causing death. He claims that the inadvertent destruction of a piece of evidence has given rise to the real risk that his trial could not now be fair.

Facts

2. I start with the facts which the prosecution claim to be able to prove at the applicant's trial. On 4th November 2007, at around 9.30 in the evening, George Johnson stepped out on to the public road at Roundwood, County Wicklow and was struck by the applicant's car and was killed. The main prosecution allegation is that the applicant was driving far too fast. There were two people in the car namely the applicant and his girlfriend Ceri Boucher. Her statement is in the prosecution's book of evidence. She claims that the two of them had a few drinks at a bar in Roundwood, that they got into the applicant's mother's car and drove carefully out of town. She says in her statement:-

> *"On passing the Roundwood Hotel I saw two men walking towards the hotel. I noticed one of them was carrying a white plastic bag. He was staggering/swaying and appeared drunk. Anthony was driving giving his full attention to the road, I believe he was driving at 25 m.p.h. At that point I turned to Anthony and said it looks like they had a good night and that's when it happened. As I was saying that a man stumbled off the pavement sideways, hit the side wing of the car and came up on the bonnet. The windscreen scattered and I assumed it was his head or shoulder that caused it. It all happened so fast there was no time to break, scream or warn Anthony."*

3. The accused's account to the Gardaí, on being arrested, was of driving at between 25 and 35 k.p.h., of his girlfriend remarking on some people having had "a good night" and before that sentence could be finished feeling an impact on the left hand side of the car. There were other people who witnessed the accident in some way. They heard, variously "a loud bang" or said "the thump before skidding was so loud, I thought he hit another car", or spoke of "a massive bang". These facts might be regarded by a jury as inconsistent with what the accused and his girlfriend have to say. I do not know how they will approach the evidence. Another witness heard what sounded to him like a car "flying down the town". That person wondered "why they would not slow down" before the noise of the collision occurred. Garda O'Donohoe, who came on the scene, claims to have got a strong smell of intoxicating liquor from Mr. Leahy's breath and arrested him for drunk driving. As a matter of fact, his breath tested at over twice the limit of alcohol consumption imposed by statute. The late George Johnson's blood was tested and it showed that he had about four times the statutory alcohol limit for driving; though there is no suggestion of which I am aware that he ever intended to drive that night.

4. A Garda investigation took place. In so far as I can tell, there is nothing to suggest this was anything than other than expert and careful. The public service vehicle inspector found extensive damage to the front bumper, near side head lamp, bonnet, near side front wing, windscreen and roof of the car driven by the accused. The brakes and the seat belts were in good condition. The tyres on the vehicle were of mixed brands and all were in good condition. Garda Tom Bolger, a forensic collision investigator examined the scene as it was preserved for investigation. On the road surface he found two locked wheel marks, in other words a skid. He claims to have worked out the point of the impact as being the distance from the wheel to the front of the car forward of a deviation. On the left hand side of the roadway he found a pool of blood and medical wipes, the place the unfortunate pedestrian was thrown. Discovering items of debris also aided in his assessment. Closed circuit television camera evidence was recovered. From this the speed of the car was calculated at approximately 72 k.p.h. in a 50 k.p.h. zone of maximum speed. The maximum speed limit, however, depends on visibility and road and traffic conditions. It is difficult to see how the maximum speed legally allowed could be justified on a dark night on the main street of a rural town. Testing the skid marks, Garda Bolger came up with a pre-skid velocity of between 66 and 78 k.p.h. He calculates that if the driver had been driving at the legal speed limit of 50 k.p.m., then the speed at which he would have hit the pedestrian, given normal breaking reaction time, would have been 23 k.p.m. In addition, the distance the pedestrian was thrown was also calculated and the result was similar to the skid analysis velocity.

The Car

5. It was not until March 2009, sixteen months after the accident that the solicitors on behalf of the applicant sought to inspect the car. The Gardaí had earlier discovered on 14th January 2008, that the car had been moved from the private

vehicle yard in which they had placed it for storage. A private individual had apparently sold parts of it, without Garda authorisation, and the car was stripped to its shell with only one back tyre remaining. The defence, in affidavit evidence and correspondence, have raised issues as to this matter. They say that it is not proven that the tyre marks on the road belong to their vehicle. They also say that the unauthorised stripping of the car, without Garda permission, undermines the ability of the defence to fairly mount a case.

6. Part of the evidence that a skid did occur comes from Garda Bolger's statement. He describes examining the front tyres on the vehicle and noting recent mark indicative of the wheels locking while the car was moving, in other words a skid. Because these tyres are now longer available to the defence they claim a severe prejudice.

Fair Trial
8. Since my judgment prohibiting a trial in Toohey v. D.P.P., delivered on 17th January 2007, [2007] IEHC 64, the law has developed. In particular, the Supreme Court have corrected that judgment by reversing it; [2008] IESC 64. It is pointless to go over the historical development of the law in this area since, in consequence of separate analysis by the Supreme Court, much clarity has been brought to bear on the law in this area.

9. The fundamental principle remains that the people of Ireland are entitled to have prosecutions brought in their name where reasonable evidence exists as to the commission of a crime by any individual. The power of the High Court to prohibit such a trial should be exercised sparingly. That jurisdiction must be exercised however, where it is established that there is a real risk that an accused person could not obtain a fair trial by reason of the disappearance of evidence. The onus of proving this rests on the accused; Z. v. D.P.P., [1994] 2 I.R. 476 at 506. An unfair trial could occur where, by reason of the disappearance of evidence, the accused is materially inhibited in making out the defence case or in challenging the prosecution case to the extent that the risk of a miscarriage of justice occurs. It is the responsibility of the trial judge to ensure fairness by controlling the prosecution presentation of the case, by controlling defence cross-examination to ensure that it is to the point, not a misstatement of prosecution witnesses' written proofs of evidence, and based upon the defence case and by giving appropriate rulings as to evidence during the course of the trial and cautioning the jury by way of warnings as to any items of evidence which requires a cautionary comment. An unfair trial, therefore, means one which carries a real risk of unfairness notwithstanding the control by the trial judge over the process, one where the potential unfairness cannot be avoided by appropriate rulings and directions; Z. v. D.P.P., [1994] 2 I.R. 476 at 507.

10. What can be overlooked, within this context, is that a criminal trial is a participative process. The accused is not entitled to engage in cross-examination at large. Instructions are taken from the accused. In this case they are straightforward. The accused was travelling at a very slow speed, could not have caused to the skid marks in question, had no time to avoid the pedestrian killed by his vehicle and was paying full attention to the road. Any cross-examination of prosecution witnesses has to proceed on the basis of these instructions; bearing in mind the entitlement of the accused to give different instructions to counsel. The accused has an entitlement to give evidence. Even where that entitlement is not exercised, there is no room within the criminal trial context to engage in speculation outside the instructions of the accused as to the facts of the alleged crime as seen from his point of view. The issue at the trial will therefore be as to whether the prosecution have proved their case beyond reasonable doubt, notwithstanding any issue that might be raised in the mind of the jury by a question asked on behalf of the accused, bearing in mind that a question asked by counsel is never evidence, and whether, if the accused gives evidence, the jury find that this account might reasonably give rise to the prosecution case being undermined.

Lost Evidence
11. The principles to be applied to this case are set out in two judgments of the Supreme Court delivered in July 2008. I will refer to both cases in the course of this discussion. In Savage v. D.P.P., [2008] IESC 39, the applicant sought to prohibit his trial for dangerous driving causing serious injury on the basis that the vehicle he had been driving at the time of the collision had since been destroyed. As in this case, eye witness evidence was available together with an extensive report from the public service vehicle inspector and the applicant had engaged in an engineer to comment on those findings. The Supreme Court upheld the judgment of the High Court refusing to prohibit the trial. In the course of her judgment, at para. 17, Denham J. set forth the following principles in relation to missing evidence cases:-

> "(i) Each case should be determined on its own circumstances.
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> (ii) It is the court's duty to protect due process.
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> (iii) It is the duty of An Gardaí Síochána to preserve and disclose material evidence.
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> (iv) This duty to preserve and disclose material evidence is to do so as far as is necessary and practicable.
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> (v) The duty to disclose and preserve, as qualified by Lynch J. in Murphy v. D.P.P., cannot be precisely defined as it is dependent on all the circumstances of the case.
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> (vi) The duty does not require the gardaí to engage in disproportionate commitment of manpower and resources.
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> (vii) In the alternative to keeping large physical objects as evidence, such as motor vehicles, it may be reasonable in certain circumstances for the gardaí to have a forensic report on the object.
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> (viii) The duty should be interpreted in a practical manner on the facts of the case.
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> (ix) If evidence is destroyed the reason for the destruction, whether bona fide or mala fide, is part of the matrix of the facts, but it is not a relevant factor in the test to be applied by the court.
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> (x) All of the above are subject to the fundamental test to be applied by the court, that of "real risk" as described by Finlay C.J. in Z v. Director of Public Prosecutions [1994] 2 I.R. 476 at p.506."

12. Fennelly J., at para. 5 of his judgment in the same case issued the following guidance on the approach to be taken in these cases:-

"(a) It is the duty of the prosecution authorities, in particular An Garda Síochána, to preserve and retain all evidence, which comes into their possession, having a bearing or potential bearing on the issue of guilt or innocence of the accused. This duty flows from their unique investigative role as a police force. (Braddish at page 133). The extent to which that duty extends to seeking out evidential material not in the possession of the gardaí does not arise in the present case (but see Dunne);

(b) The missing evidence in question must be such as to give rise to a real possibility that, in its absence, the accused will be unable to advance a point material to his defence. This is, like the garda obligation to retain and preserve evidence, to be interpreted in a practical and realistic way and "no remote, theoretical or fanciful possibility will lead to the prohibition of a trial."(Dunne page 323);

(c) The fact that the prosecution intends to rely on evidence independent of the missing evidence at issue in order to establish the guilt of the accused does not preclude the making of an order of prohibition. In Dunne, the prosecution intended to rely on a confession. This did not defeat the applicant's complaint of the failure of the gardaí to take possession of a video tape covering the scene of the robbery;

(d) The application is considered in the context of all the evidence likely to be put forward at the trial. The court will have regard to the extent to which aspects of the prosecution case are contested. In Bowes, the fact that the motor car in which the applicant was alleged to have been travelling had been lost by the gardaí was insufficient, when the applicant did not contest the fact that he was driving it and the charge related to possession of drugs found in the boot of the car. In McGrath, the court had regard to the "circumstantial" character of the prosecution case of dangerous driving. In McFarlane, the existence of photographic evidence of the missing fingerprints was highly material to the complaint that the original items had been lost by the gardaí;

(e) The applicant must show, by reference to the case to be made by the prosecution, in effect the book of evidence, how the allegedly missing evidence will affect the fairness of his trial. Hardiman J said in McFarlane (page 144) that:

"In order to demonstrate that risk there is obviously a need for an applicant to engage in a specific way with the evidence actually available so as to make the risk apparent."

(f) Whether the applicant, through his solicitor or otherwise makes a timely request of the prosecution for access to or an opportunity to have the articles at issue expertly examined may be highly material. In Bowes, the "very belated" request was critical to the refusal of relief. On the other hand, in Dunne, no request was made until some five months after charge, and long after there was any possibility of producing the video tape. In that case, however, Hardiman J stated (at page 325):

"There is……a responsibility on a defendant's advisers, with their special knowledge and information, to request material thought by them to be relevant."

However, a suspect or an accused person will be unable to make a timely request, if the gardaí have destroyed or parted with possession of the material. Thus, they must give consideration to the likely interests of the defence before making such decisions;

(g) The essential question, at all times, is whether there is a real risk of an unfair trial. (Scully page 257). The court should focus on that issue and "not on whose fault it is that the evidence is missing, and what the degree of that fault may be." (Dunne page 322)."

13. In Ludlow v. D.P.P., [2008] IESC 54 the Supreme Court upheld a decision of High Court to restrain a prosecution for dangerous driving causing death. Again a public service vehicle inspector's report was available showing excessively worn tyres, which were said to be contributing factor to the apparent loss of control of the applicant's car in wet road conditions. These tyres were taken from the vehicle and, after having been photographed, were returned to the applicant's employer. They were then disposed off. Reading that case, it seems that crucial to the Supreme Court's decision was the importance of the tyres to the case being made out by the prosecution.

14. In so far as there is a distinction between principle (vii) of the judgment of Denham J. in Savage and principle (g) of the decision of Fennelly J. in the same case this is not crucial to my determination in this case. In Ludlow Hardiman J. closely focuses on the issue of fault in the Garda handling of the investigation. In C.D. v. D.P.P., [2009] IESC 70, the judgment of Fennelly J. mentions in passing the absence of fault in the Garda investigation whereby what was agreed to be relevant to the video evidence was destroyed. In Dunne v. D.P.P., [2009] IESC 14, the focus of the judgment of Fennelly J. is on the effect of the loss of the evidence and the relatively unimportant nature of that evidence as compared to the other evidence available in the case.

15. It can be the situation that evidence is lost due to the actions of the accused, or due to the ordinary things that will happen over time. Thus, people will die and the delay in prosecuting a case which has the result that material evidence is lost due to a witness no longer being available can result in a case being prohibited or overturned on appeal; People (D.P.P.) v. Crilligan and O'Reilly, (No. 2) [1989] I.R. 46. It could also be alleged that the accused had attacked a person, rendering him in state where he had no memory of an assault. A murder scene could burn down due to an electrical fault, thus, disposing of evidence that might be relevant to both sides. In one case within the last decade an accused was convicted of murder notwithstanding the fact that he had burnt the body of deceased on a pyre of old tyres. It could also be the case that the prosecuting authorities might face an allegation that they had deliberately destroyed evidence in order to conceal potentially relevant evidence as to the accused's innocence. While less relevant, therefore then the effect of the evidence being missing, there can be circumstances where the reason why it has disappeared should be taken into account by the court.

16. None of these cases are concerned with a theoretical shortcoming in a criminal investigation. Any fault in the gathering and preservation of evidence must be demonstrated by the accused to have led to a situation where a real risk exists, that the accused will not obtain a fair trial, notwithstanding the presumption that the trial judge will make appropriate rulings as to the admissibility of evidence and give appropriate warnings, where needed, as to how the jury

are to approach particular items of evidence.

17. As has been emphasised on many occasions by the courts, the accused has an obligation to engage with the evidence. That does not mean that he is obliged to show his defence within the context of a judicial review. He may make a choice one way or another but he must discharge the burden of proof in this forum. . At the trial, however, the defence is not there to engage in a speculative exercise involving a wide raging trawl through the possibilities as to what may have occurred. Rather, they are focussed on putting the defence case presented to them in consultation. In Perry v. D.P.P. [2007] 164, [2008] IESC at para 24 of his judgment Fennelly J. said the following:-

> *"As been emphasised many times, this type of application must be considered in the context of all the evidence likely to be put forward at the trial. The key question whether there is a real risk of an unfair trial cannot be viewed in Vacuo. Evidence is never perfect. Neither the prosecution, nor the defence can be assured that all conceivable evidence will be available."*

18. One of the most fundamental factors, it seems to me, leading to the Supreme court refusing to prohibit the trial in Savage v. D.P.P, [2008] IESC 39 was the availability of other evidence. In the course of his judgment, Fennelly J. emphasised that factor together with the right of an accused person to give evidence in his own defence. In that case, an expert report was adduced putting forward the possibility that a front tyre had blown on rounding a bend and that this was what had caused the vehicle to lose control. Fennelly J. emphasised that it is important to consider any contended-for point as to effect of the disappearance of her evidence in the context of all of the facts of the case. He said:

> "21. … I think it is always essential to consider the matter in context. A particularly striking aspect of that context is the evidence of one eyewitness, Teresa Kenny. According to her statement, she will swear that:
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> *"I heard a real hard engine revving as the car was coming along – I turned to see if it was a robbed car. I could see this car flying down the street as if it was out of control. It looked as if it was swerving from side to side. As I was looking I heard a loud bang and the car seemed to explode…"*

22. The interests of a fair trial demand that the prosecution case be heard and the prosecution witnesses called in the normal way. Dr Jordan makes no attempt to explain evidence of this kind or to explain how it is consistent with the technical possibilities he raises.

23. More fundamentally, arguments of this type raise real concern that applications for prohibition may transmute into a type of criminal trial in reverse. A witness, particularly an expert witness, speculates as to possible explanations for certain facts. It is perfectly permissible at a trial for the defence to call expert evidence as to the possible explanations for any aspect of the case.

24. Dr Jordan, as an expert witness, suggests at least three alternative possible hypothetical explanations for the accident. None is related to any evidence from the appellant. That is the appellant's right. None relates to the body of independent evidence, which is nowhere mentioned by Dr Jordan. In response to the specific question upon which he was asked to report as to whether it was "reasonably possible that the impacts occurred in a manner other than suggested in the Book of Evidence," his report says: "It is possible." His explanations for this conclusion do not, at any point, refer to the eye-witness evidence.

25. It has not been shown to my satisfaction that the appellant will be unable to put forward these explanations at the trial. The concern of Dr Jordan is to raise possibilities, which is a perfectly legitimate role for an expert to play at the trial. The appellant has not, in my view, made out a sufficient case that he will not have a fair trial. I would dismiss the appeal."

Conclusion

19. My conclusion is that the trial of the applicant for dangerous driving causing the death of George Johnson on 4th November 2007, should not be prohibited. My reasons are:-

> (1) There is available on case to both the prosecution and the defence, contending accounts as the speed of the vehicle driven by the applicant. It is for the jury to resolve these issues of credibility. If the prosecution do not choose to call a particular piece of evidence, then I have no doubt that they will make it available to the defence in accordance with their obligations as set out in The People (D.P.P) v Tuite (1993) 2 Frewen 175.
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> (2) A comprehensive report on the condition of the vehicle driven by the applicant has been made available by the prosecution. This public service vehicle inspector's report can be the basis for the defence seeking expert advice and it can be sought to be undermined by either cross-examination or by the defence calling an expert of their own.
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> (3) There are strong physical indications that the applicant's vehicle locked in to a skid, hit the deceased and then came to a halt some distance afterwards. An obvious set of skid marks was found to be present on the roadway at Roundwood. It may be that the defence will say that this skid mark has nothing to do with the vehicle which had been driven by the applicant into the deceased, and it could well be that they will adduce positive evidence that the mark was on the roadway earlier that day, or for some time beforehand. They may call expert evidence to say that the skid mark does not accord with the pattern that might be left by the vehicle being driven by the accused, who is the applicant in this case. This is within the normal exchange of evidence that takes place in the context of a criminal trial.
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> (4) In addition to that, video evidence is available from which the speed of the applicant's car can be measured. Again, the defence are not obliged to accept this evidence, they may seek to undermine it by cross-examination or they may call positive evidence of their own whereby they seek to raise a doubt in relation to the calculation made, in that regard, by Garda Bolger.
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> (5) In addition, a calculation as to car speed has been made by Garda Bolger on the basis of the position of the body relative to the point of collision. His evidence, in that regard, can be undermined by cross-examination or different expert evidence can be forward by the defence to challenge his conclusion.

(6) Within this context, Garda Bolger also gave evidence that there were marks on the tyres of the vehicle. These tyres have now been destroyed in circumstances which were no fault of An Garda Síochána. Garda Bolger can be cross-examined as to the correctness of his interpretation of the marks which he saw on these tyres or expert evidence can be led by the defence to the effect that his interpretation was wrong. The unavailability of the tyres can be used by the defence to undermine the soundness of the foundation to his opinion.

20. Overall, in the context of all the evidence in the case, the unavailability of the two tyres is not sufficient for the accused to have discharged the onus of proving that there is now a real possibility that he cannot obtain a fair trial for dangerous driving causing death and other relevant charges.