

**THE HIGH COURT
DUBLIN**

BRIAN MCGRATH

CASE NO. 2004 141JR

APPLICANT

**AND
DIRECTOR OF PUBLIC PROSECUTIONS**

RESPONDENT

Approved judgment delivered by Mr. Justice I. O'Neill on Thursday 23rd February 2006

1. Mr. Justice O'Neill: The applicants in these two cases are both charged with assault, contrary to Section 3 of the Non-fatal Offences Against the Person Act, 1997, on one Peter Dennehy. In these judicial review proceedings they were given leave by order of myself on 23 February 2004 to seek an order of prohibition of the criminal proceedings commenced on foot of the above mentioned charges.
2. In these proceedings they are given leave to seek an order of prohibition and also various declarations. The principle grounds upon which they were given leave to seek those reliefs were that the respondents failed to seek out and preserve digital visual recordings made by cameras at the location where this assault is alleged to have happened.
3. The relevant facts of this matter may be summarised as follows: The alleged incident happened at approximately 1:30a.m. at a venue known as Club Tivoli nightclub, Francis Street in the city of Dublin. Both applicants were employed by a company known as Seneca Limited which provides, or did provide, security services to the owners of that nightclub. Both of the applicants were employed in the capacity which I think is colloquially, or familiarly, known as bouncers.
4. There were 14 security cameras in these premises of which 11 were working on the night in question. There were two cameras at the front door, it is alleged, and apparently one of these was not working. There was one camera at the end of the hall pointing out towards the front door. There was also a camera over the door from a side exit from the premises.
5. There are two entirely conflicting stories of what happened on the night in question. The story of the injured party, Mr. Dennehy, is that he approached the door of the nightclub but that he did not have a ticket. He went away, he and his friend came back with tickets, presented the tickets but were refused entry. He was annoyed and frustrated at this, having gone to the bother and expense of acquiring tickets. He says that he caught the coat or some garment of one of the applicants and whereupon he alleges the door was quickly opened and he was pulled inside and viciously assaulted by both applicants. Thereafter, he was escorted from the premises through the side door back on to the street.
6. The version of events given by the applicant is that on the night in question, late in the night when they were approaching the time of closing up, the two applicants were on duty and the injured party and another man, who they described as being in a drunken state, approached the premises seeking entry. They did not have tickets -- one of them did and one of them didn't, or at least one of them was a student and one wasn't. They were refused entry. They came back a couple of times. On the last occasion, the injured party forced the door open, burst through the door, and proceeded to assault one of the applicants, Mr. Hogan; that he was punching and kicking and generally behaving in a wild and dangerous fashion. He had to be restrained by both applicants. He was restrained by them and he was taken into a room and there he was calmed down. There was a proposal to call the police, which it is claimed by the applicants, the injured party asked not to be done. In view of that request it was not done.
7. He was then, having been calmed down, escorted from the premises, down the corridor, through the dance floor and out the side exit. Thereafter the police arrived on the scene, in particular Garda Moran.
8. The applicants' story is supported by one other employee, that is to say a Fiona Hurley who has made a statement. The injured party was there in the company of his friend. There were also two girls apparently outside the door who witnessed certainly some of the incident and all of these have made statements to the Gardaí.
9. The Gardaí were called to the scene by a friend of the injured party and they arrived at 1:50 and entered the premises. It is the evidence of Garda Moran, that he inquired about videotape recording, particularly of the front door area, that he was brought to a room where there was a screen showing all images from the operating cameras, but that there was no image from the front door. His evidence was that he was told by Mr. Morgan Carroll, who is in a managerial capacity, that there was a camera at the end of the hall pointing to the door and he asked to view this. His evidence was that he also viewed images from the camera showing the side exit.
10. In the images from this camera he saw the injured party leaving the premises, escorted by three persons. He was visible on this piece of film for approximately two to three seconds but that his face could not be seen, only the back of his head and that he could only be identified from his coat. It was Garda Moran's evidence that he also viewed the film from the camera showing the dance floor for approximately two minutes but that nothing at all was seen from these images. He worked his way backwards viewing images from the exit right through the dance floor until they came to the camera showing images from the hall area.
11. His evidence was that in the film -- or images from the camera from the hall area, there was nothing discernible. There was merely a red haze and that no human shapes were visible. He conceded that there was a suggestion of a moving shape, but nothing that could be seen or discerned or identified. His evidence was that one could not see the front door or the door to the office, which apparently was near the front door. It was Garda Moran's opinion that there haze was caused by red lights along the corridor and that in his view the camera was out of focus.
12. Mr. Morgan Carroll, who was the bar manager, he saw this material as well and his evidence differed to a significant extent as to what was to be seen from the camera or the images from the hall area. His evidence was on affidavit. His evidence was that one could see shapes and specifically the outline of a person outside the front door framed against its glass pane. One could see the door rapidly opening apparently pushed in, and a person coming in and then followed by a scuffle inside.
13. Garda Moran's evidence was that he did not think any of the visual recordings that he was shown showed anything that was of any evidential value, hence his evidence was that he did not seek to take these recordings into Garda custody to preserve them.
14. It is, in effect, this decision on the part of the Gardaí, or this failure on the part of the Gardaí who were investigating the matter to have sought this material and to have taken it into Garda custody for preservation that is challenged in these proceedings.
15. There are clearly conflicts of evidence between Garda Moran and Morgan Carroll. Mr. Carroll says he offered other recordings to

Garda Moran, apart from the one from the hall, and that his evidence on affidavit was that Garda Moran declined to view these images. He also says that Garda Moran inquired if these images could be burned on to a CD. He informed Garda Moran that they could. Mr. Carroll says that Garda Moran said he would be back the next day at two o'clock to collect the CD but that he never showed up. It was Mr. Carroll's evidence that he rang the Garda station and was told that a car would come to collect the CD but, in fact, it never did. Garda Moran says that he was only offered the hall video and that there was no mention at all of any visual images from a camera at the door. He said there was no image from the door on the screen which displayed all of the images from the operating cameras, that is when he entered, what is described as, the maintenance room.

16. He asked about burning these images on to a CD before he viewed the images. His evidence was that after he saw them, he did not require any. He also said that he and Garda Connaughton, soon after this incident in February 2003, pulled up outside the premises in their car, being curious at the absence of recording of the door. His evidence was that they saw no camera at the door.

17. Later on, some months later when these recordings were demanded by the solicitor for the applicant, he returned, got out and inspected the area around the door and he saw no camera there and also no attachments for a camera and no wiring for a camera.

18. The principles that apply to the issues in this case are well settled and, indeed, not at all in dispute in this case. They may be summarised as follows: Firstly, that there is a duty on the Gardaí, where it is reasonable and practicable to do so, to seek out and preserve evidence that bears on the guilt or innocence of an accused person; secondly, that an applicant in seeking an order for prohibition must establish firstly that there has been a breach of the aforementioned duty on the part of the Gardaí and; secondly, that there is a real risk, a real and substantial or serious risk, that by reason of the absence of whatever evidence is not sought or not preserved that there is a real risk that the applicant cannot get a fair trial in the absence of that evidence; thirdly, in proceedings of this kind are not a form of disciplinary tribunal on the conduct of the Gardaí, ultimately the real issue is whether or not the applicant cannot get a fair trial because of the absence of the evidence in question.

19. I am satisfied on the evidence that Garda Moran was not offered images from front door cameras. I am satisfied that he sought this evidence in the first instance it is common case that was not shown to him. It is quite clear that his first interest or his immediate interest was to see images from cameras at the front door displaying what happened at the front door because clearly that is where it all happened or a good deal of what happened took place. There seems to me to be no good reason why he would not have viewed this material, if it was available to him.

20. I am satisfied that he must have been given the impression that it was not available. This may very well have come about by reason of the fact that it is certain that one of these cameras was not working at all and when Garda Moran went into the room where this screen was there were no images from any camera displaying the front door up on the screen and that leads me to the conclusion that it is probable that Garda Moran is correct that he did seek evidence from these cameras, if there were cameras at the front door and that this was not proffered to him.

21. I am not satisfied from the evidence that the evidence establishes that there was available any such recording from cameras at the front door of what happened at the front door.

22. I am satisfied that he did view images from the camera over the side door and also images from the hall camera and that he tracked the injured party back from the point of exit.

23. I am also satisfied that his approach to this material was fundamentally flawed in that his interest was solely on evidence to strengthen the prosecution case and that he did not look at the matter from the point of view of securing evidence that might have assisted the defence.

24. In addition to that, or indeed apart from that, the images viewed -- these images from the camera in the hall and the camera at the side entrance viewed on behalf of the defence or with the defence viewpoint, as a prominent consideration and perhaps enhanced as they might have been, might have yielded information that might have been useful to the defence.

25. Where there is a visual recording of a crime or the scene of the crime or the immediate aftermath of it, in my view, the Gardaí have a duty to seek out and to preserve these recordings. In my view, Garda are not entitled to reject this material because they are of the opinion that either it is of no evidential value or because it does not bolster the prosecution case.

26. As has been said in a number of cases, there is nothing that could be of greater importance than visual recordings of the actual occurrence of the crime or the scene where it is alleged to have occurred or indeed of events immediately following the crime. It hardly needs to be said how important a recording of these events would be in the investigation of a criminal event and ultimately in the trial of somebody in respect of a charge arising out of these events.

27. So, in my view, Gardaí should be extremely slow to reach conclusions as to the value of this evidence. The mere fact that it exists at all is, in my view, is sufficient to warrant its collection and preservation by the Gardaí.

28. This is a not burdensome duty, all that is required is to obtain approximately 15 to 20 minutes of visually recorded images which can be, at very little trouble, inconvenience or expense, burnt on to a compact disk. Unfortunately, that was not done in this case so far as the images from the hall camera and the images from the side camera -- the side entrance are concerned.

29. As I have said earlier, I am not satisfied on the evidence that there were any images arising from any camera at the doorway.

30. Because of the foregoing I am satisfied that the Gardaí did fail in their duty to seek out and preserve recordings of the hall from the camera at the end of the hall and the camera at the side entrance.

31. The next issue which arises is, does this failure put the applicants in a position where they now cannot get a fair trial. Analysing the missing images, so to speak, appears to me to be the first exercise that must be done to reach a conclusion as to their probable value. I accept the evidence that there was only two to three seconds duration of images showing the injured party. This is so far as the images from the camera at the side entrance are concerned. That would seem to me to make a good deal of sense because what was happening, as is common case, was that the injured party was being escorted off the premises and he would have simply have passed this camera by and that would have been that.

32. I accept the evidence because it accords with the known facts that he was escorted by three people from the premises and it is common case that at that stage whatever may have happened before that nothing untoward was happening during his passage from the premises at that stage. Regardless of what may have happened before, calm had been restored and what you had then was a

man being escorted in an orderly fashion from the premises by a number of other men.

33. It would seem to me that it is highly improbable that there would be material from that kind of short clip of film which could be, in reality, be used to persuade a jury of anything.

34. It was argued on behalf of the applicants that there could be observations derived from the images on the film which might be consistent with either version of event. For example, the Gardaí say that the injured party was not drunk when they observed him but that he was distressed. The applicants say that he had been drunk and aggressive but had become, by the time he was escorted off the premises, quite calm. In my view, it would be very unlikely that anything persuasive would have been revealed in that short clip of film which could usefully be used to try and persuade a jury that he was -- that there was anything decisive in the short clip of film concerning the injured party's demeanour or condition or state at that stage.

35. Having regard to the shortness of the episode of film, the nature of the activity going on at the time, the limited view there would have been of him it would seem to me that it would be very difficult to realistically persuade any court that the film revealed anything about anything decisive about his condition at that stage.

36. So far as the film of the hallway is concerned, as I have already alluded to, there is a difference of opinion between Garda Moran and Mr. Carroll as to what this piece of film or this visual imagery revealed. Mr. Carroll's evidence was that he was able to see a person outlined outside the door, through the glass and then the door quickly bursts open, or opens rapidly, I think were the words he used, and there was a scuffle inside. It was Garda Moran's evidence that nothing at all could be seen, that all there was to be seen was a red haze with perhaps some kind of shadowy figure. Both agree that the quality of the images -- the quality of the recording was very poor.

37. It would seem to me that taking it at its height from the applicants' point of view, that is to say the height of what Mr. Carroll has to say about it, his description of what was seen seems to me to be equally consistent with both versions of events. The figure outside, the door opening rapidly, the scuffle inside seems to me to be all consistent with either version of events. Having regard to the, apparently, very poor quality of the visual recording, again it would seem to me to be highly unlikely that it could be sought to persuade a court of the truth of either version of events placing reliance on this particular piece of film or visual -- digitally recorded visual imagery.

38. In this case there were several eyewitnesses. So far as events outside the door were concerned there was the evidence of the applicants, the injury party himself, his friend and then the two ladies who were there, who have made statements and are available as witnesses. Then there is the evidence of the two applicants and then there is the evidence of Fiona Hurley, who also have made statements. It would seem to me that in the light of the quality of the recordings and in the light of the availability of all of these eyewitnesses that the absence of the above two recordings, that is to say, recordings from the camera at the side entrance, and the recording from the camera in the hall, could not, in my view, be said to materially disadvantage the applicants in their defence of these charges.

39. That being so, I am satisfied that the applicants have failed to discharge the onus which is on them of demonstrating that they cannot get a fair trial because of the absence of this potential evidence.

40. In those circumstances, I must refuse the application.