Neutral Citation Number: [2011] IEHC 241

THE HIGH COURT

2010 1181 JR

BETWEEN

JAMES RYNN

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Kearns P. delivered the 23rd day of June, 2011

In these proceedings the applicant seeks an order by way of judicial review for prohibition of his forthcoming criminal trial on the basis of the alleged 'failure' on the part of the gardaí to preserve certain items of evidence the absence of which is claimed to render it impossible for the applicant to obtain a fair trial. In this case the items in question are two lorries which were involved in a serious road traffic accident.

BACKGROUND FACTS

The facts leading to the criminal prosecution of the applicant arise from a road traffic accident which occurred on the M4 motorway near Barrogstown, Maynooth, Co. Kildare just before 9.00 a.m. on 20th November, 2008. On that occasion the applicant was the driver of an articulated lorry proceeding from Dublin which drove into the back of a coal truck which had been travelling in the same westerly direction and which after the accident was found located on the left hand hard shoulder of the motorway. The coal truck was found to have shed its load, though whether that was caused by the impact between the vehicles or had commenced prior to impact is unclear. The point of impact as marked on the garda sketch appears to be on the border of the inside lane and the hard shoulder. From the markings on the road surface it appears that the collision pushed the coal truck forward. The driver of the coal truck was found on the road margin to the passenger side of his own vehicle having suffered severe lacerating injuries to the skull. He died at the scene. The position of his vehicle and that of his body suggest that his own vehicle was pushed forward into collision with him after he had dismounted from his cab to investigate some problem with his vehicle or load.

The applicant did not advance any specific reason for the collision in his cautioned statement to the gardaí made after the accident. He stated as follows:-

> "I was driving along and the next thing I remember is hearing a bang, it seemed to be on my left hand side. I can't remember anything else after that… I don't remember seeing anything on the road that would have forced me to swerve."

In his witness statement, which is included in the Book of Evidence, Tom McMahon, a bus driver employed by Bus Eireann who was driving behind the applicant at the time of the crash, states as follows:-

> "I observed the lorry in front start to pull into the hard shoulder. It looked to me like he was pulling in to stop. I don't remember him having indicated to do this and I also can't recall seeing any brake lights. He continued to pull over and the next thing I saw was what I can best describe as an explosion… I would estimate that the lorry was almost the full way into the hard shoulder when this explosion occurred. I proceeded past the lorry very slowly. I may have pulled out into the overtaking lane to do so but I can't be sure. It was only as I was travelling past the lorry that I could see he had collided with another vehicle."

A Garda forensic investigator, Sgt. Duggan examined the scene and states in his statement of evidence and investigation report, which is included in the Book of Evidence, that the driver of the coal truck appeared to have pulled in as he was about to shed some of his load of coal. The resting position of the driver indicates that he had got out of his truck and had gone to the passenger side. Sgt. Duggan concluded that the post-impact position of both vehicles was consistent with the evidence of Mr. McMahon, i.e., that the articulated lorry veered into the hard shoulder. Sgt. Duggan also concluded that the lack of skid marks indicated that the applicant did not apply the brakes before the impact. His final conclusion was as follows:-

> "There is no logical reason why the driver of the articulated truck entered the hard shoulder. This action was the primary cause of the collision."

Garda John Galvin, a PSV Inspector, also prepared a detailed report about the condition of the two vehicles, which is contained in the Book of Evidence. Both vehicles were found to have been in good pre-accident condition. The Book of Evidence also contains a detailed map of the scene prepared by Garda Galvin and numerous photographs of the scene, including aerial photographs.

In the aftermath of the accident it appears that the vehicles were brought to Murphy Truck Centre, Ballymount, Dublin for further assessment by the relevant insurers. It is deposed in the affidavit of Garda Aoife O'Reilly that Virginia Transport Ltd., the owners of the truck driven by the applicant (his employers at the time of the accident), were contacted after these assessments, as were the representatives of the deceased driver of the coal lorry, and these parties all consented to the release of the vehicles from storage. The applicant's vehicle was released on 8th May, 2009 and the other vehicle was released on 29th May, 2009. The applicant's solicitors state that they were never directly informed that the vehicles were to be released and the gardaí are not in a position to contradict that statement.

The applicant made a statement in relation to the incident on 21st April, 2009. He was subsequently charged with dangerous driving causing death contrary to section 53 (1) of the Road Traffic Act on 22nd October, 2009. The applicant first appeared in the District Court on the 7th January, 2010. He was served with a Book of Evidence and was returned for trial to Naas Circuit Court on 18th February, 2010. When the applicant was returned for trial, his solicitors engaged advice of counsel. On the advice of counsel, a

consulting engineer was engaged, and the engineer, having reviewed the relevant documents, was of the view that he needed to examine both vehicles to give a definite account of the cause of the collision. The applicant first sought examination of the vehicles on the 31st March, 2010. The office of the Chief State Solicitor wrote in reply on the 21st May, 2010 to say the vehicles were no longer available for inspection. The present judicial review proceedings were instituted on the 25th August, 2010.

The applicant seeks an order of prohibition on the grounds that the gardaí have disposed of vital evidence without providing the applicant an opportunity to have it examined, thereby creating a circumstance whereby the applicant is seriously prejudiced and where there is a real risk of an unfair trial.

The applicant submits that the risk arises in the following manner. The coal lorry when impacted was not in the position in which it was later found. It is claimed on the applicant's behalf that without examining the components of the coal truck it is impossible to ascertain where it was at the time of the accident. The applicant further claims that the accident may have been caused by the wheel of the applicant's lorry being damaged by a loose driveshaft coming away from the lorry. It is speculated that the breaking of the driveshaft may have caused the coal lorry to stop suddenly thereby causing the coal lorry to stop as it did. The applicant's engineer is of the opinion that a gouge mark left in the road was probably made by the driveshaft in question and the engineer also noted damage to the offside inner wheel tyre of the applicant's own vehicle. However, the applicant's engineer states that he is unable to give a definite opinion to this effect without examining both vehicles.

THE LAW
The applicant seeks to rely primarily on *Braddish v. D.P.P.* [2002] 1 I.L.R.M. 151 and *Savage v. D.P.P.* [2008] I.E.S.C. 39.

In *Braddish*, Hardiman J. stated as follows:-

> "It is the duty of the Garda, 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… The prosecution are not entitled to take the view that once they have better evidence, or evidence more convenient for them to deploy, they are entitled to destroy the evidence which came first to hand."

The Court further stated that the rule applied not only to evidence with a direct and established evidential significance, but included items which may give rise to the reasonable possibility of securing relevant evidence.

There have been a number of developments in this area since the seminal case of *Braddish* and it is apparent that the courts are becoming increasingly intolerant of missing evidence cases and that a trial will only be prohibited in exceptional circumstances.

The case of *Savage v. D.P.P.* [2008] I.E.S.C. 39 concerned a factual scenario similar to that in the present case. The accused was charged with dangerous driving causing serious bodily harm. The vehicle driven by the applicant had been destroyed and the applicant produced evidence from an engineer that questioned several aspects of the report of the inspection carried out by the gardaí. The engineer concluded that it could have been of significant assistance to the applicant had he been able to inspect the vehicle. The Supreme Court refused prohibition. Denham J. held as follows:-

> "This application falls to be determined in all the circumstances of the case. These include:-
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> (i) the car was inspected by the public service vehicle inspector and the gardaí, and those reports are available to the applicant;
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> (ii) the applicant has obtained and may utilise expert reports on these reports and query the evidence of the car;
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> (iii) the applicant has means, therefore, to put in evidence the condition of the vehicle, as a defence, if he so wishes.
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> Bearing in mind the charge, and all the circumstances, which include the public service vehicle inspector's report, the garda evidence and the forensic engineer's evidence obtained by the applicant and available to the applicant, I am not satisfied that the applicant has established that there is a real risk, by reason of the absence of the car, of an unfair trial arising from its destruction."

Fennelly J., summarising the principle points relevant to whether a court will make an order prohibiting a trial on account of missing evidence, stated as follows:-

> "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...;
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> 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 v. Director of Public Prosecutions* [2002] 3 I.R.305];
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> 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;
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> 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 v. D.P.P.* [2003] 2 IR 25], 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 v. D.P.P.* [2003] 2 I.R. 25], the court had regard to the "circumstantial" character of the prosecution case of dangerous driving. In [*McFarlane v. D.P.P.* [2007] I I.R. 134], 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 v. D.P.P.* [2005] 1 IR 242, 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)."

Fennelly J. also expressed concern about the role of speculative evidence in applications for prohibition based on missing evidence. He stated as follows:-

"[A]rguments 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.

[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 [the expert witness]. 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.

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 [the expert witness] 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."

In *Perry v. Judges of Circuit Criminal Court and the D.P.P.* [2008] I.E.S.C. 58, the applicant was charged with dangerous driving causing bodily harm and the vehicle which he had been driving was destroyed prior to the issue of a summons for the offence. The applicant sought prohibition on the grounds that he believed that the steering had locked immediately before the accident and he claimed that, as he had been deprived of the opportunity to professionally examine the vehicle, there was a real risk of an unfair trial. Certain witnesses in the case, however, had made statements that the applicant was speeding immediately prior to the accident taking place. Fennelly J., with whom Hardiman and Denham JJ. concurred, stressed that the applicant's submitted alternative cause of the accident was mere speculation and was not sufficient to prohibit a trial. He stated as follows:

"The question is whether the Appellant has discharged the burden of proof which rests on him to show that there is a real risk that he will not have a fair trial. He must demonstrate this by analysis of the evidence or by producing evidence of his own. In the present case, the evidence as presented in the book of evidence suggests speed as the overwhelmingly likely cause of the crash. It could, of course, be suggested at trial that the evidence does not exclude the possibility that, even in the absence of direct evidence, the steering had locked. That would be a speculative line of defence, which might be placed before a jury in the hope of persuading the jury that there was a reasonable doubt as to the cause of the crash. To suggest, however, that the trial should be stopped, because the Appellant has been unable to have the car examined to search for merely possible explanations would be to encourage mere speculation."

Fennelly J. further noted that there was nothing to prevent the applicant from advancing at trial the possibility that the steering had locked:-

"It is scarcely necessary to emphasise that the refusal to prohibit the trial does not in the slightest inhibit the appellant or limit his freedom to raise in his defence to the charge he faces at trial by evidence suggesting that the steering locked or otherwise. The purport of this judgment is that he has not shown that there is any real risk that his trial will be unfair in that or in any respect."

In *Leahy v. the D.P.P.* [2010] I.E.H.C. 22, Charleton J. took into account the existence of a report in dismissing an application for prohibition where the applicant was not able to examine a vehicle due to its prior destruction. He stated as follows:-

"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 evidence and it can be sought to be undermined by either cross-examination or by the defence calling an expert of their own."

In *Perry*, Fennelly J. emphasised that, in order to secure prohibition of a trial, an applicant must engage specifically with the evidence and it is not sufficient for an applicant to speculate about possible hypothetical situations:-

"The quoted passage from the Appellant's affidavit falls well short of meeting the requirement by reference to the evidence in the case. The Appellant raises an issue as to whether the steering locked and that this event caused the accident. He does not, in his affidavit, say that he experienced anything of the sort. If the steering had actually locked in such a way as to deprive the Appellant of the normal ability to control the car, to steer it around the bend in the road

resulting in the car leaving the road and crash into the garden of a house beside the road it would have been perfectly possible to say so. The statements of the Appellant on affidavit and indeed the original affidavit of his solicitor strongly suggest that the verbs 'believe' and 'feel' are carefully chosen. They do not refer to any precise recollection of an event of locking occurring contemporaneously with the accident but rather that the Appellant had experienced some stiffness or heaviness with the steering over time and was seeking to relate this to the accident."

DECISION

I do not believe that the applicant has engaged specifically with the evidence in the case at hand. Instead the focus has been entirely on the possibility of some mechanical failure in the coal lorry which might have caused it to stop suddenly. This case might have assumed a quite different configuration if it was contended that some mechanical failure in the articulated vehicle being driven by the applicant had caused it to run into the back of the vehicle in front. Absent any such contention the clear legal obligation on the applicant was to maintain a sufficient distance behind a vehicle in front so as to be able to cope with any emergency that might arise, including the sudden stopping of a vehicle in front. It seems to me to be largely if not entirely immaterial that the forward vehicle may have stopped or pulled over because it had begun to shed its load for some mechanical or other reason or because, for example, a child had wandered out in front of it.

In the applicant's affidavits, the applicant fails to state what he himself believes caused the accident. He simply states that a consulting engineer is of the view that the coal lorry may have been forced to stop because of driveshaft failure and he points to the presence of the driveshaft on the road. The applicant, in his own voluntary cautioned statement, stated that he did not see anything on the surface of the road prior to the collision and this is all mere conjecture.

It is quite clear that there is no circumstance arising in this case to prevent the applicant from calling the engineer to give evidence as to the possible cause of the crash. The garda case can be challenged on the basis of the evidence currently available and no defence has been closed off to the applicant. This is not therefore one of those exceptional 'missing evidence' cases which would warrant prohibition.

I would in any event have refused relief because of delay, both in seeking inspection and in bringing this application. The applicant appears to have had the benefit of legal advice from an early stage and I note that his grounding affidavit carefully avoids specifying the date upon which he first obtained such advice. In any event the applicant was charged in 2009 and the first request for inspection was not made until March, 2010. Prosecuting authorities can not be expected to house and store large vehicles for indeterminate lengths of time while those facing prosecution sit on their hands and do nothing. There are obvious logistic and financial implications which would flow from any such supposed obligation. An applicant and his advisers must move with expedition in such circumstances. This they did not do.

Equally, the judicial review application was not brought until the end of August, 2010. It was certainly not brought promptly, given that the applicant was served with a Book of Evidence on 18th February, 2010 and returned for trial on that date. I would regard such delay as totally unacceptable also and would refuse relief for that reason also.