Neutral Citation Number: [2005] IEHC 299

THE HIGH COURT

[2004 No.1111 JR]

BETWEEN

DENNIS LUDLOW

APPLICANT

AND
DIRECTOR OF PUBLIC PROSECUTIONS AND
HIS HONOUR JUDGE MICHAEL O'SHEA

RESPONDENTS

Judgment of Ms.Justice Dunne delivered on the 16th July, 2005.

1. This is an application for judicial review seeking to restrain by injunction the first named respondent from continuing to prosecute the applicant and for an order prohibiting the second named respondent from trying the applicant in criminal proceedings before Carlow Circuit Court on the grounds that the State failed to preserve evidence essential to the prosecution and the applicants defence, namely two truck tyres.The applicant further seeks a declaration that the first named respondent and the Gardaí were obliged to preserve such evidence as was relevant to the said prosecution and the defence thereof, including the said two tyres.The applicant herein was given leave to apply for judicial review by order of the High Court made herein by Mr.Justice Smyth on the 10th December, 2004.

2. On the 8th October, 2002, it is alleged that the applicant was involved in a road traffic accident involving his vehicle and a vehicle driven by one Darren O'Neill, deceased, on a public road at Roscat, Tullow, Co.Carlow.The said Darren O'Neill deceased, was driving his motor vehicle accompanied by his wife and child at approximately 2.00 pm in the afternoon.It is alleged that the vehicle in which the applicant was driving was travelling in the opposite direction.Thereafter it is alleged that the applicant's vehicle slid onto its incorrect side of the road and collided with the deceased's vehicle.At the time of the collision the applicant was driving motor lorry registration no.98 KE 8097 in the course of his employment as a truck driver.The point of collision was on a sweeping bend on the said roadway.Unfortunately, as a result of the collision the said Darren O'Neill died on the 11th November, 2002.Witness statements taken by the Gardaí indicate that at the time of the collision, it was raining, the road was greasy, neither of the vehicles involved "were going excessively fast" and the lorry started to slide in the direction of the far side of the road.It seemed to slide across the road.

3. An inspection of the vehicle which the applicant had been driving was carried out by Sergeant Donal Prendergast on the day of the accident.Sergeant Prendergast stated that the right front and right inner tyre of the rear axle were excessively worn and he concluded that:

> "The overall effect of the excessively worn tyres would contribute to the loss of direction control of the vehicle in wet road surface conditions."

4. On the 11th February, 2003, the applicant attended at Tullow Garda Station by appointment and met with Garda Morrissey.Prior to this date, a statement dated 27th January, 2003, was furnished to Garda Morrissey by the applicant which statement is exhibited in the Book of Evidence.Thereafter the applicant was summonsed to appear at Tullow District Court and on the 24th July, 2003, the applicant was returned for trial to Carlow Circuit Court.A Book of Evidence was served on the applicant on the 24th July, 2003.The applicant was originally returned for trial on the following charge:

> "On the 8th October, 2002, at Roscat, Tullow, Co.Carlow a public place in the District Court area of Tullow, did drive a vehicle, registered no.98 KE 8097 in a manner (including speed) which having regard to all the circumstances of the case (including the condition of the vehicle, the nature, condition and use of such place and the amount of traffic which then actually was or might reasonably be expected then to be therein), was dangerous to the public, thereby causing the death of another person, namely Darren O'Neill.
>
> Contrary to s.53 (1) (as amended by s.51 of the Road Traffic Act 1968) and (2) (a) (as amended by s.49 (1) (f) of the Road Traffic Act 1994 (of the Road Traffic Act, 1961, as amended by s.23 of the Road Traffic Act, 2002)."

5. On the 29th October, 2004, two further summary offences were added to the indictment.They are as follows: "On the 8th October, 2002, at Roscat, Tullow, Co.Carlow, a public place in the District Court area of Tullow, did use a mechanically propelled vehicle, registered no.98 KE 8097 while the pneumatic tyre fitted to the said vehicle, namely the right rear tyre, was excessively worn.

6. Contrary to Article 16 (7) of the Road Traffic (Construction, Equipment and use of Vehicle Regulations) 1963 as amended and

> On the 8th October, 2002, at Roscat, Tullow, Co.Carlow, a public place in the District Court area of Tullow, did use a mechanically propelled vehicle, registered no.98 KE 8097 while the pneumatic tyre fitted to the said vehicle, namely the right front tyre, was excessively worn.
>
> Contrary to s.16 (7) of the Road Traffic (Construction, Equipment and Use of Vehicles) Regulations 1963 as amended…".

7. By letter dated the 25th September, 2003, the applicant's solicitor, Andrew Coonan, of Coonan Cawley wrote to the State Solicitor, Alan Millard notifying him that the applicant intended to put the State on full proof of all witness statements and exhibits contained in the Book of Evidence served on the applicant.By letter dated 9th October, 2003, the State Solicitor wrote to the applicant's solicitor indicating that the applicant's case was unlikely to proceed to trial on 14th October, 2003, the next criminal session in that area.

8. By letter dated 29th October, 2003, Mr.Millard wrote to Mr.Coonan indicating that the first named respondent herein had directed that the two District Court summonses referred to above would be added to the indictment under s.6 of the Criminal Justice Act 1951 and a copy of the indictment intended to be proffered at the applicants trial was also forwarded to Mr.Coonan.

9. On the 15th January, 2004, Mr.Coonan wrote to Dennis P.Wood, engineer requesting that he investigate the circumstances and the vehicle surrounding the accident on behalf of the applicant.By reply dated the 16th January, 2004, Mr.Woods requested that the thread depth details of the types on the applicant's vehicle be made available to him and further he inquired as to whether or not the truck tyres were available for inspection.Subsequently on the 23rd January, 2004, Mr.Coonan wrote to Mr.Millard requesting information regarding said depth measurements taken by Sergeant Prendergast and inquiring in the alternative if the tyres were

available for inspection.Mr.Millard then wrote to Mr.Coonan by letter dated 5th February, 2004, stating that he would revert to Mr.Coonan when he received instructions from the Gardaí.Reminders were sent to Mr.Millard by letters dated 29th April, 2004 and the 4th June, 2004.By letter dated 10th June, 2004 Mr.Millard replied indicating that he was still endeavouring to obtain information regarding thread depth from Sergeant Prendergast.Further additional evidence was served on Mr.Coonan on behalf of the applicant at that time.

10. On the 18th August, 2004, Mr.Coonan received a letter dated 13th August, 2004, enclosing by way of additional evidence statements of Garda John Morrissey and Sergeant Donal Prendergast together with photographs of the two allegedly worn tyres on the vehicle.Information was also provided in the statement of Sergeant Prendergast as to the alleged thread depths of the two allegedly worn tyres on the truck and further stated that the two tyres were not available for inspection as they "remained on the truck and after inspection the vehicle was returned to its owner".In the said letter of the 13th August, 2004, Mr.Millard made the following comment: "Sergeant Prendergast's statement indicates that the tyres were returned to the owner, presumably Mr.Snowden, of whom inquiry therefore be made please."

11. On the 19th August, 2004, Mr.Coonan wrote to Mr.Raymond Snowden, the employer and owner of the vehicle which the applicant was driving on the date of the accident requesting details as to where the tyres were and indicating that the applicant wished to have the said tyres examined.No reply was received to the letter.A phone call was made by Mr.Coonan to Mr.Snowden on the 21st October, 2004 and in that conversation Mr.Snowden indicated that following the return of the tyres along with the truck he, Mr.Snowden, had disposed of the tyres.He further informed Mr.Coonan that he had not been requested by any party to store, keep or otherwise preserve the tyres.

12. The above is a summary of the facts as deposed to by the said Andrew Coonan in his affidavit sworn herein on the 3rd December, 2004.Garda John Morrissey in an affidavit sworn herein on 18th February, 2005, on behalf of the first named respondent herein, referred to a number of factual matters in his affidavit.He stated at the time of the collision it had been raining and he described driving conditions as treacherous.He stated that he searched the scene of the accident extensively to see if there was any evidence of oil or other material on the road that might explain the collision but that he found no such evidence.He referred to the examination of the applicant's vehicle by Sergeant Prendergast.He further states that on 8th October, 2002, the day of the accident, after Sergeant Prendergast had completed his examination of the vehicle and the tyres on that vehicle, it was returned to the applicant himself for the purpose of returning it to its owner.He therefore makes the point that the applicant was fully aware from that point onwards that the vehicle with the same tyres was returned to the owner.He points out that the examination carried out by Sergeant Prendergast was done at the scene of the accident in the presence of the applicant and accordingly he makes the point that the applicant was therefore aware that the tyres had been examined and was in a position to have them independently examined if he wished to do so.He refers to the fact that before leaving the scene of the accident he issued the applicant with an oral warning as to his driving.He therefore disagrees with the factual statement by Andrew Coonan in his affidavit where it is stated that it is unclear when the vehicle and tyres were returned to the owner.This was conceded at the hearing before me.He points out that the applicant was fully aware of the date and the circumstances in which the vehicle and tyres were returned to the owner.He went on to say that it would not be practicable or feasible for the Gardaí to seize and retain tyres pending completion of a prosecution for insufficient thread on tyres.Finally he pointed out that it was well over a year after the accident before a request was received from the applicant or by anyone acting on his behalf to have the vehicle or tyres independently inspected.

13. An affidavit was also sworn by Sergeant Donal Prendergast on the 18th February, 2005.He confirmed that he examined both vehicles at the scene of the collision.He stated that his examination of the truck being driven by the applicant took approximately two hours.He noted a number of defects in relation to the right front tyre and the right inner tyre on the rear axel.He pointed out that the effect of excessively worn tyres would have been to contribute to a loss of direction control in wet road conditions.He confirmed that it had been raining that day and the road was very wet.He also deposed to the fact that the applicant was present at all times during the examination of the vehicle which he had been driving.Following the examination, the truck was removed from the scene of the accident by towing, owing to the extent of the damage.He stated that the vehicle was returned to the applicant at approximately 6.30 pm on 8th October, 2002.He went on to state that the Gardaí did not retain possession of the said vehicle or the tyres after the date of the accident.He said the applicant was clearly aware that neither the vehicle nor the tyres had been retained by the Gardaí and in fact had been returned to the owner as the applicant was in fact directly involved in so returning them.

Submissions

14. In the submissions on behalf of the applicant it is pointed out that the main thrust of the case against the applicant is the allegation as to excessively worn tyres.The sequence of events following the collision on the 8th October, 2002, was outlined.It is submitted on behalf of the applicant that while he was present when the vehicle was returned through him to its owner he would not have been aware of the significance of the tyres until he was charged in June 2003 at the earliest and perhaps not until served with the Book of Evidence on 24th July, 2003.By then the tyres were no longer available.Thus it is argued that as a result of the failure of the first named respondent to preserve the tyres the applicant has been left with no opportunity to test or rebut the evidence of Sergeant Prendergast in relation to the thread depths on the tyre which is central to the three charges on the indictment.

15. Submissions were also made on behalf of the applicant in relation to delay.The first aspect of delay dealt with related to the delay in requesting inspection of the vehicle and tyres.In this regard it is submitted the time runs against the applicant only from the date upon which he was served with a summons, at the earliest.Reliance was placed upon the decision in *McGrath v.Director of Public Prosecutions* [2003] 2 I.R.25 at page 40.It is pointed out that although the applicant would have been aware of the return of the vehicle and the tyres to his employer on the date of the accident he would not have been aware of the significance of the tyres until he was charged.At that stage it was already too late to request an inspection as the tyres had been disposed of shortly after the accident.It is submitted that as the owner of the truck was also being prosecuted in the District Court in relation to its condition there was no obligation or necessity to return the vehicle to the owner.Further it is submitted that the first named respondent ought to have ensured that the tyres alleged to have been excessively worn were retained before returning the vehicle if a prosecution against the applicant was being considered for dangerous driving causing death on the basis of driving with excessively worn tyres.It is conceded that there was a delay in requesting an inspection of the tyres between the date of when the Book of Evidence was served i.e.the 24th July, 2003 and the date upon which inspection was requested on the 23rd January, 2004, but that having regard to the length of time it took the respondent to reply and the fact that the tyres were disposed of in October, 2002 it is argued that the delay is of no consequence.Finally the point was made that the inability of the respondent to meet the request of the applicant is solely the consequence of the failure to preserve the most material evidence in the prosecution against the applicant.

16. As indicated above the question of delay arose in two ways.The other aspect of delay relates to that involved in applying for leave to apply for judicial review.The applicant's solicitors had to wait until 13th August, 2004, before the first named respondent formally notified the applicant's solicitors that the tyres were unavailable for inspection.It is argued that thereafter the applicant moved reasonably promptly to seek judicial review.It is further pointed out that following the letter from the State solicitor of the 13th August, 2004, the applicant's employer confirmed on 21st October, 2004, that the tyres had been disposed of.Accordingly it is

argued that the applicant ought not to be refused relief on the basis of such delay between 13th August, 2004, at the earliest or possibly 21st October, 2004 and the date upon which the application for judicial review was made namely the 10th December, 2004.

17. The next point raised on behalf of the applicant related to the duty on the part of the first named respondent to preserve material evidence.In this regard counsel referred to a number of authorities namely *Murphy v.Director of Public Prosecutions* [1989] I.L.R.M.171, *Braddish v.Director of Public Prosecutions* [2001] 3 I.R.127, *Dunne v.Director of Public Prosecutions* [2002] 2 I.R.305, *McGrath v.Director of Public Prosecutions*, Unreported, High Court, 20th December, 2001 and finally the Supreme Court decision in that case which is reported at [2003] 2 I.R.25.

18. Much reliance was placed on the decision in the case of McGrath, which was a case concerning a prosecution for dangerous driving causing death.In the High Court it was held by Murphy J.that the applicant in that case had not shown on the balance of probabilities that she would suffer serious or any prejudice to the extent that no fair trial could be held.In that case the accident occurred on 21st March, 1999.The vehicles involved in the accident were inspected on 22nd March, 1999.The applicant was interviewed on 30th March, 1999 and made a statement and subsequently made a further statement on 28th July, 1999.On 24th September, 1999, a summons was served on the applicant under s.53 of the Road Traffic Act, 1961, charging her with dangerous driving causing death.On 1st November, 1999, the solicitor on behalf of the applicant first indicated that he wished an opportunity to inspect the motorcycle.Finally, it was common case that the P.S.V.inspectors found that the motorcycle and car involved in that particular case appeared to have been in serviceable condition prior to impact.Accordingly she was refused the relief sought.

19. The view taken by the Supreme Court on appeal (Hardiman J.) from the decision of Murphy J.was somewhat different.It was held that time could not run against the applicant before the proceedings against her were commenced.Her only entitlement to have the motorcycle examined arose from her right to a fair trial, which did not arise until a decision to prosecute was taken and communicated.It was further held that the applicant had suffered the loss of a reasonable prospect of obtaining evidence to rebut the case made against her by reason of the Gardaí having parted with the motorcycle and she had not disentitled herself to relief by delay or otherwise.Accordingly, it was argued on behalf of the applicant in this case that the circumstances are on all fours with the decision in the McGrath case insofar as the Gardaí themselves thought it important to have an examination of the lorry carried out for their purposes and it is submitted they ought to have retained, at least, the tyres complained of until the conclusion of the proceedings.Instead they parted with them before they knew whether there would be any proceedings or not and with even greater dispatch than occurred in the McGrath case.This happened notwithstanding the significance which it now appears Sergeant Prendergast had attached to the tyres in question, given that he had indeed actually taken photographs of the two tyres concerned before returning the vehicle to its owner and formed a view as to their relevance to the cause of the collision.In those circumstances it is argued that it would be fundamentally unfair to allow the proposed trial to proceed, having been denied by the first named respondent of any opportunity to have the tyres in question inspected independently.

20. Counsel on behalf of the first named respondent firstly submitted that the onus on an applicant to prohibit a criminal trial is borne by the applicant.Reference in this regard was made to the decision of the Supreme Court in the case of *Z.v.D.P.P.*[1994] 2 I.R.476, and in particular the judgment of Finlay C.J.at p.506 as follows:

> "The onus of proof which is on an accused person who seeks an order prohibiting his trial on the grounds that circumstances have occurred which would render it unfair is that he should establish that there is a real risk that by reason of those circumstances … he could not obtain a fair trial."

21. This was referred to in the decision of the Supreme Court, per Hardiman J., in the case of McGrath referred to above.It was stated by Hardiman J.as follows:

> "I entirely agree that the judgment of Finlay C.J.cited by the respondent correctly expresses the criteria to be met in applications such as the present.It is also manifestly true that the focus in any such application must be on the fairness of the eventual trial, and not on the discovery of shortcomings in the investigative process except insofar as they impact on the prospects of an unfair trial."

22. Accordingly it is argued that the test to be applied by the court in considering an applicant's claim is whether the risk would prevail despite appropriate rulings and directions by the trial judge.

23. Counsel then proceeded to deal with the obligation to preserve relevant evidence which has now been dealt with in a number of decisions.Reference was made to the decision in *Murphy v.D.P.P.*[1989] I.L.R.M.71, where it was stated by Lynch J:

> "The authorities establish that evidence relevant to guilt or innocence must so far as is necessary and practicable be kept until the conclusion of the trial.These authorities also apply to the preservation of articles which may give rise to the reasonable possibility of securing relevant evidence."

24. Reference was also made to the decision in *Dunne v.D.P.P.*[2002] 2 I.R.305 at 323, where Hardiman J.said:

> "In cases where the evidence is not of such direct and manifest relevance, the duty to preserve and disclose has to be interpreted in a fair and reasonable manner … a duty so qualified cannot be precisely or exhaustively defined in words of general application … the duty must be interpreted realistically on the facts of each case."

25. It was further stated in that case by Hardiman J.that the obligation to preserve evidence requires that "no remote, theoretical or fanciful possibility will lead to the prohibition of a trial".Counsel also referred to the decision in the case of *McKeown v.The Judges of the Dublin Circuit and D.P.P.*, Unreported, Supreme Court, 9th April, 2003, where it was stated by McCracken J.:

> "The jurisdiction of the High Court to prohibit a trial is based on the basic and constitutional rights 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 as strong a case as possible against the wrongdoers, 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."

26. Applying those principles to the present case it is argued that the accident in this case took place on 8th October, 2002.The applicant was interviewed on 11th February, 2003.In the course of interview he was specifically questioned about the excessively worn tyres on his lorry.He was aware that the vehicle was returned to its owner after the Garda investigation on the day of the accident.It is argued therefore, that it was not unreasonable to expect the owner, a haulier who had himself experience of working as a mechanic and that the applicant or indeed both of them would have been aware that the condition of the vehicles and tyres would become an issue in the future, particularly as the collision in question had had fatal consequence.This is contrasted with the type of

case in which a vehicle has, for example, been returned to a person from whom it had been stolen and who could not be expected to be aware of the need to preserve it in any particular condition.In fact that is what occurred in the case of *McKeown*.Accordingly it is submitted that the applicant was not entitled to the relief sought because of the delay on his part in seeking access to the tyres concerned.It is also submitted that he and his employer should have been aware that the tyres might be needed in connection with any legal proceedings that might arise.

27. Reference was also made to the decision of the High Court and the Supreme Court in the case of *Scully v.D.P.P.*[2002] 2 I.L.R.M.396 and Supreme Court, Unreported, 16th March, 2005.In that case Kearns J., in the High Court, (as he then was) considered the earlier decision in the case *of Mitchell v.D.P.P.*[2002] 2 I.L.R.M.396 and stated:

> "This decision confirms my own view that, wherever evidence has either not been obtained or been lost, which it is contended might have some relevance in establishing guilt or innocence, the court should not too quickly yield to an application to prohibit a trial, and indeed should not accede to such an application where an explanation is forthcoming for the absence of the evidence and that explanation establishes to the satisfaction of the court that the evidence or material could have no possible bearing on the guilt or innocence of the accused.The judgment also makes clear that, subject to the qualification spelt out by Geoghegan J., the Gardaí must be allowed to function and perform their duties without having impossible requirements heaped upon them.In that case, as in this, the video camera could yield up nothing useful for the reason stated.On it being established that there is no actual prejudice to an applicant there is, in my view, no basis for prohibiting a trial.
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> The judgment and the recent decision of the Supreme Court in McKeown reinforces my own view that some sort of commonsense parameters of reasonable practicality must govern any determination of the scope of the duty on the Gardaí when seeking out or preserving evidence.This must of necessity imply that some margin of appreciation be extended to Gardaí when investigating crime to determine what they may reasonably consider to have some possible relevance in establishing guilt or innocence."

28. Accordingly Kearns J.dismissed the applicant's application.The Supreme Court also dismissed the appeal of the applicant in that case.In the course of his judgment in the Supreme Court, Hardiman J.stated:

> "One is concerned, first and last, whether there is a real risk of an unfair trial.Obviously this question will depend on the individual circumstances of each case."

29. The Supreme Court in that case distinguished it from the *Braddish* decision cited above, given that in *Braddish* the missing video tape was the matter which led the Gardaí to suspect the defendant in the first place, something that was not applicable in the *Scully* case.

30. It was pointed out on behalf of the first named respondent that whilst the applicant has not had an opportunity to inspect the tyres concerned, he has been furnished with detailed photographs thereof.In those circumstances it is argued that the applicant has not made out a case that he runs a real risk of not getting a fair trial on the charges in respect of which he seeks prohibition.

31. The final point raised on behalf of the first named respondent related to the practicality of preserving the tyres in this particular case.By way of response on this particular point, counsel for the applicant commented on the fact that there was no evidence before this court as to any difficulty that could arise in relation to preserving the tyres.

Decision

32. I have considered the line of authorities opened to me by counsel on behalf of the applicant and counsel on behalf of the first named respondent herein.Most recently, the authorities in this area have been considered in the decision in *Scully v.The Director of Public Prosecutions* referred to above.It is interesting to note, as is observed by Hardiman J.in that particular case, that the development of the law in this area has coincided with "the ability of science and technology to provide apparently incontrovertible evidence by such means as video filming and DNA testing".(See p.8 of the judgment of Hardiman J.) That particular case related to an alleged robbery at a filling station.There the issue concerned the question of a video tape.As was also stated by Hardiman J.in that case:

> "As in many other areas of law, fundamental principles can be uncontroversially stated but their application to the myriad circumstances which arise in practice can cause difficulty."

33. It seems to me that the first principle to be borne in mind in this particular case is this, that if there is a real risk of an unfair trial then this court must prohibit the trial.Secondly, this court has a duty to keep a reasonable balance between the obligation of the prosecution to present as strong a case as possible and the right of an accused to defend himself.(See McCracken J.in *McKeown v.The Judges of the Dublin Circuit Court and D.P.P.*, referred to above.) Thirdly, I think it is clear from the decision in the *Scully* case and in particular the passage from the judgment of Kearns J.in the High Court, referred to above, that there must be some commonsense parameters of reasonable practicality governing the determination of the scope of the duty on the Gardaí when seeking out or preserving evidence.

34. In the case before me, I think it is clearly established that central to the prosecution of the applicant for dangerous driving causing death was the condition of the tyres alleged to be excessively worn.This could not be in any doubt.If there were any doubt as to this issue, then the decision to add two additional counts to the indictment in October, 2003, would surely have put the matter beyond question.This is not a case in which the significance of the tyres was not known to the Gardaí.Sergeant Donal Prendergast made a statement dealing with the excessively worn tyres which appears in the book of evidence, a further statement by way of additional evidence was made by Sergeant Prendergast, disclosing the photographs taken by him at the time of his examination and in the affidavit sworn by Sergeant Prendergast on behalf of the first named respondent herein, he made the following comments:

> "My examination took approximately two hours.I found a number of defects in relation to the vehicle driven by the applicant including excessively worn tyres and the malfunctioning of recording equipment.… The principal defects in the applicant's vehicle material to the present application were that the right front tyre was excessively worn and the right inner tyre on the rear axle was excessively worn.The effect of excessively worn tyres would have been to contribute to a loss of direction control in wet road conditions.It had been raining that day and the road was very wet."

35. He also pointed out in the course of his affidavit that during the examination he took photographs of both vehicles involved in the collision.Accordingly it cannot be argued that the Gardaí were unaware of the importance or significance of the tyres.The question therefore arises as to whether the Gardaí were under a duty to preserve the tyres.

36. The facts in this case are not dissimilar from the facts in the case of *McGrath v.The Director of Public Prosecutions* referred to above which, as already indicated, was one of two decisions dealt with in one judgment by the Supreme Court.As already indicated, the applicant in that case was charged with dangerous driving causing death.The accident in that case occurred on 21st March, 1999 and a summons was served on Ms.McGrath on 24th September, 1999.However, on 5th August, 1999, the motorcycle involved in the collision, which had belonged to the deceased had been, at his family's request, released to a motorcycle dealer and was thereafter broken up for parts.Within a relatively short time after the service of the summons, Ms.McGrath's solicitor sought various documents including a "motor forensic report" on the motorcycle.The solicitor was advised by the Gardaí that the relevant information would be available in the book of evidence which was then being prepared.Subsequently it was indicated that the applicant might engage a forensic engineer to examine the motorcycle involved in the accident.Finally, information was furnished to the solicitor for the applicant by fax in February 2000, indicating that the motorcycle in question had been broken up for parts.In applying the principles to the facts of the case it was stated by Hardiman J.at p.38 of his judgment as follows:

> "It appears to me that any person and certainly any lawyer apprised of the largely circumstantial nature of the prosecution case from reading the book of evidence would consider a technical examination of the motorcycle on behalf of the defendant not merely reasonable but necessary and important.This was the immediate view of counsel consulted on her behalf and its correctness is emphasised by the affidavit of Dr.Jordan quoted above.This view is not at all qualified by the fact that the Garda vehicle inspector doubts that the information hoped for by Dr.Jordan from an examination of the motorcycle would in fact be available.It is sufficient that an examination would have offered what Lynch J.in *Murphy v.Director of Public Prosecutions* [1989] I.L.R.M.71, at p.72 called '… the reasonable possibility of rebutting the evidence proffered against him'."

37. Thus there cannot be any doubt as to the importance in the present case of the tyres for the purpose of permitting a forensic examination to be carried out with a view to obtaining evidence with which to rebut the technical evidence to be given by Sergeant Prendergast.Therefore, I am satisfied that there was a duty to preserve the tyres.There is no evidence before me to suggest that this was not possible to do.

38. One of the points strongly argued on behalf of the first named respondent in this case was the delay in making this application.Indeed it was also strongly argued that there was delay on the part of the applicant in seeking to have the tyres examined in circumstances where the applicant himself was involved in the return of the tyres to their owner.It was stated in the *McGrath* case by Hardiman J.at p.40 that:

> "It is very difficult to regard time as running against her before the proceedings were commenced.Her only entitlement to have the motorcycle examined arises from her right to a fair trial, which hardly arises until a decision to prosecute is taken and communicated.At the time the Gardaí parted with the possession of the motorcycle, they did not think it necessary to give notice of their intention to do so to the applicant presumably because they did not know that she would be prosecuted and therefore did not consider that she was entitled to notice."

39. Undoubtedly, there is a difference between the facts of this case and those of the *McGrath* case.In the *McGrath* case, the Gardaí retained possession of the motorcycle concerned for a number of weeks after the fatal condition.In the present case, the vehicle to which the tyres were attached was returned to its owner to the knowledge of the applicant herein, on the day of the accident.Having regard to the decision in the *McGrath* case, it seems to me that an applicant could not be expected in a case such as this to anticipate the importance of preserving the evidence before at the earliest being charged or at the latest being served with a book of evidence.In this case the book of evidence was not served until 24th July, 2003.It should, of course, be noted that the two additional counts relating to the worn tyres were added to the indictment on 29th October, 2003.Thereafter, in January, 2004, the first request to inspect the vehicles was made.There is undoubtedly some degree of delay involved in making the request for inspection but I cannot conclude that that delay was of such a degree as to disentitle the applicant to relief.It is notable that the Gardaí were just as slow in responding to the request as the applicant's solicitor was in seeking the opportunity to inspect.Further, it should be noted that from the information before me, it seems that the tyres were disposed of by the vehicle's owner shortly after the vehicle was returned to him.Accordingly, no matter how speedy the applicant's solicitor was in making a request to inspect the tyres, it would have been of no avail.Finally, on this point, I do not think that the fact that the applicant was aware of the return of the vehicle on the evening in question to the owner in some way removes the duty on the Gardaí to preserve the evidence.

40. In the circumstances, I am satisfied that the applicant herein has established that there is a real risk that, by reason of the failure to preserve the tyres in this case, that he could not obtain a fair trial.I am also satisfied that he is not disentitled to relief by virtue of any delay on his part which would disentitle him to relief.Finally, I note the observations of Hardiman J.at p.41 of his judgment in the *McGrath* case where he stated as follows:

> "Dangerous driving causing death is an offence whose seriousness has been underlined by the fairly recent increase of the maximum penalty to ten years imprisonment.Experience shows that it is almost unique, amongst offences not requiring a specific intent, in carrying a real possibility of a significant custodial sentence for a convicted person of good character.One would hope that its very seriousness would, in future cases, ensure that items of manifest evidential potential are properly preserved.These two cases tend to indicate that there may be a need for a more cohesive practice among the Gardaí in the preservation or disposal pre-trial of evidence which is potentially relevant to the defence in criminal proceedings.The adoption and observance of suitable guidelines might assist in avoiding pre-trial litigation of this nature."